

THE YALE LAW JOURNAL

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The Modification of Decrees in the Original Jurisdiction of the Supreme Court

ABSTRACT. Interstate disputes in the Supreme Court's original jurisdiction often implicate long-term interests, such as state boundaries or rights to interstate bodies of water. Decades after the Court issues a ruling in an original jurisdiction case, the parties may ask the Court to revise its decree. However, the Court's current standard for considering modification requests is underdeveloped and inconsistent. With the rights of entire state populations on the line, there are strong considerations on both sides: interests in ensuring that an original jurisdiction decree is sufficiently final, but also in ensuring that in the event of significant, unexpected changes, the Supreme Court can modify its decree. This Note surveys all original jurisdiction cases since 1791 and concludes that the Court revises its decrees far more often than its purported standard would suggest. It then proposes a clearer finality principle that accurately reflects its behavior and effectively accommodates the competing needs for finality and justice. Tracing the historical development of decree modifications from the days of Lord Francis Bacon through the merger of law and equity and onward to the Court's recent institutional-reform cases, this Note argues that the general finality principle that has developed through these cases in the district courts is normatively and descriptively superior to the one-off test announced by the Supreme Court in original jurisdiction cases.

AUTHOR. Yale Law School, J.D. expected 2017. I offer warm thanks to Professor Eugene Fidell, Jane Ostrager, and Joseph Nawrocki for their role in helping this Note take root; to Professor Nicholas Parrillo for detailed and careful comments that helped it grow; and to Jennifer Yun and the editors of the *Yale Law Journal* for their exemplary pruning. Most importantly, thanks to my ever-supportive family: Jeffery, Misty, Alyssa, Joshua, and Julia.



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INTRODUCTION

The Constitution reserves the power to invoke the original jurisdiction of the Supreme Court—to ask the Court to swap its lofty appellate musings for the gritty, fact-laden inquiries of a trial court—to a few parties whose dignitary interests are thought to require it.¹ These parties are sovereigns and their representatives: states; the United States; and in theory—though no longer in practice—ambassadors, public ministers, and consuls.² The few parties who possess this power rarely invoke it,³ and even then the Court may decline to exercise its jurisdiction if the “seriousness and dignity of the claim” is insufficient.⁴ When the Court allows an original jurisdiction case to go forward, however, the resulting litigation—like the embattled sovereigns—proceeds on an unusually long time horizon. The case may turn on events that

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1. U.S. CONST. art. III, § 2, cl. 2 (“In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.”).
 2. See Henry Wade Rogers, *The Essentials of a Law Establishing an International Court*, 22 YALE L.J. 277, 280 (1913) (“De Tocqueville said: ‘In the nations of Europe, the courts of justice are only called upon to try the controversies of private individuals; but the Supreme Court of the United States summons sovereign powers to its bar.’”); see also CHARLES WARREN, *THE SUPREME COURT AND SOVEREIGN STATES* 6-8 (1924). In addition to states and the United States government, ambassadors, public ministers, and consuls can also invoke the original jurisdiction, see U.S. CONST. art. III, § 2, cl. 2, but in only two such cases has such an invocation produced a decision on the merits, see *Casey v. Galli*, 94 U.S. 673 (1877); *Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384 (1798); see also Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 718-19 (1959). Although Indian tribes are sovereign as well, they do not have the power to invoke the Court’s original jurisdiction. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 25 (1831) (acknowledging that the Cherokee Nation is sovereign but refusing to grant it the right to sue in the original jurisdiction); see also *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (holding that a foreign state cannot bring suit against an American state in the original jurisdiction, at least without that American state’s consent); John C. Sullivan, *Considering the Constitutionality of Nonstate Intervenors in Original Jurisdiction Actions*, 86 NOTRE DAME L. REV. 2219, 2224 (2001) (exploring the Court’s inconsistent positions over time as to when nonstate parties may intervene in original jurisdiction cases).
 3. There have been 263 cases in the original jurisdiction resulting in some form of published action by the Court. See Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court’s Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 216-42 (1993); Note, *supra* note 2, at 901-19; *infra* Appendix B.
 4. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); see also McKusick, *supra* note 3, at 202 (“The substantial set of gatekeeping rules that the Supreme Court has developed adds up to making its original jurisdiction for practical purposes almost as discretionary as its certiorari jurisdiction over appellate cases.”).

occurred before a state joined the union,⁵ an interstate compact formed before the ratification of the U.S. Constitution,⁶ or a royal proclamation that predates the Declaration of Independence.⁷ Once the Supreme Court decides an original jurisdiction case, its judgment can spur decades of additional litigation.⁸ This longevity,⁹ combined with the specificity of many decrees,¹⁰ can produce decrees that no longer meet the parties' needs decades later.¹¹ In such circumstances, the Court faces a question on finality: when should it modify its own judgments?

Before addressing this normative question, however, one first needs a clear empirical understanding of the Court's current practice. To investigate this practice, I surveyed all 263 original jurisdiction cases over the Court's two-century history. I categorized them based on the nature of the dispute and the resolution of each case and analyzed how often the Court has modified its decrees.¹²

The results of my survey demonstrate that the Supreme Court's words on finality have not matched its actions. In *Arizona v. California*,¹³ the principal case on point, the Court claimed to be guided in its exercise of discretion by "principles of res judicata."¹⁴ But its announced doctrine does not accurately describe its approach across the original docket. The data suggest that (1) the Court frequently modifies decrees, and (2) the Court is more likely to modify decrees in cases where dynamic fact patterns are likely to arise. Building on these findings, the Note proposes an alternative descriptive account: instead of applying principles of res judicata, as *Arizona v. California* purports to do, the

5. See, e.g., *Alaska v. United States*, 545 U.S. 75, 110 (2005) (holding that the United States reserved title to certain intrastate submerged lands when it admitted Alaska to the Union).

6. See, e.g., *Virginia v. Maryland*, 540 U.S. 56, 78-79 (2003) (determining riparian rights with reference to an interstate compact from 1785).

7. See, e.g., *New Hampshire v. Maine*, 532 U.S. 742, 746 (2001) (noting that King George II established an interstate boundary in 1740 in a boundary dispute).

8. See, e.g., *United States v. California*, 135 S. Ct. 563, 563 (2014) (entering the fifth supplemental decree in a fifty-year-old case).

9. See, e.g., *id.*

10. See, e.g., *New Jersey v. New York*, 526 U.S. 589, 589-90 (1999) (considering, for the purpose of fixing the location of an interstate boundary at Ellis Island, details as narrow as whether a pier had been built on filled land before entering a mathematically precise decree in accordance with GPS-based testimony).

11. See, e.g., *Wisconsin v. Illinois*, 311 U.S. 107, 110 (1940) (modifying a decree temporarily because the water flow apportioned by the decree had led to an accumulation of sludge).

12. See *infra* Part IV; *infra* Appendix A.

13. 460 U.S. 605 (1983).

14. *Id.* at 626.

Supreme Court in practice has used a flexible test like the one that district courts have long applied when considering requests for decree modifications.¹⁵

Moreover, the Court *should* continue to apply its flexible test to requests for decree modifications in original jurisdiction cases. The test dates back to Lord Francis Bacon's ordinances. Though it has changed somewhat over the centuries, the standard has survived the test of time in broad strokes because it takes into consideration the Court's concern with "general principles of finality and repose"¹⁶ and balances that concern against case-specific facts that may justify modification.

The Court, then, should explicitly identify its flexible standard as the test that it has applied and will continue to apply in its original jurisdiction cases. Aligning the Court's purported test with its actual approach to requests for decree modification will provide litigants with clearer and more accurate guidance than the Court's announced – yet ignored – doctrine of "principles of res judicata."

The issue of finality in the Supreme Court's original jurisdiction has received no scholarly attention until now. In general, the literature on the Supreme Court's original jurisdiction is relatively sparse.¹⁷ Scholars have addressed a number of questions peculiar to the original jurisdiction, such as whether the Court's extensive delegation of power to special masters is troubling¹⁸ and whether Congress or the Court has the power to prescribe the procedures original jurisdiction litigants must follow.¹⁹ Some commentators have examined procedural questions, such as what the Court would do if a

15. See *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992). I do not advocate for the Court's more recent articulation of the standard for district courts in *Horne v. Flores*, 557 U.S. 433 (2009), for reasons discussed *infra* Part V.

16. *Arizona v. California*, 460 U.S. at 626.

17. One original jurisdiction case, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is celebrated, though not for its original jurisdiction significance specifically. *But see* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) (considering implications specific to original jurisdiction).

18. See, e.g., Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction*, 87 MINN. L. REV. 625 (2002); see also Cynthia J. Rapp, *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* (Oct. 2004) (on file with author).

19. See, e.g., Stephen R. McAllister, *Can Congress Create Procedures for the Supreme Court's Original Jurisdiction Cases?*, 12 GREEN BAG 2D 287 (2009); Stephen R. McAllister, *Congress and Procedures for the Supreme Court's Original Jurisdiction Cases: Revisiting the Question*, 18 GREEN BAG 2D 49 (2014); see also *Kansas v. Colorado*, 556 U.S. 98, 109–10 (2009) (Roberts, C.J., concurring) (arguing that the Exceptions Clause demonstrates that the Supreme Court, not Congress, has the power to set witness fees in original jurisdiction cases).

Justice recused himself or herself and the vote was tied,²⁰ or how the early Court conducted a jury trial.²¹ However, no scholar has squarely addressed the finality of judgments in original jurisdiction cases.

This Note begins to fill that gap. Section I.A briefly describes the history of the Court's original jurisdiction. It then offers a procedural outline for a modern original jurisdiction case. This procedure is characterized by "gatekeeping"—the Supreme Court's calculated effort to protect itself from time-consuming original jurisdiction cases—and provides the background for the Court's stated interest in finality in original decrees. In the same vein, Section I.B enumerates courts' and litigants' interests in finality and highlights the heightened stakes of finality in the original jurisdiction.

Part II compares the quintessential original jurisdiction case—the dispute over an interstate boundary—with water rights cases. In boundary disputes, finality was once thought essential to prevent war. On the other hand, as water rights cases illustrate, changed circumstances sometimes outweigh finality interests, making decree modification essential. The case studies in this Part show that the Supreme Court modifies decrees more frequently in water rights cases, which have dynamic fact patterns, than in boundary disputes, where the facts remain relatively static.

Having examined the potential for variation in decree modifications in original jurisdiction cases, Part III considers the standard for modifying decrees in original jurisdiction cases that the Court announced in *Arizona v. California*.²² There, the Court declared that it would exercise its discretion and apply "principles of res judicata" and "general principles of finality and repose" to judgments in original jurisdiction cases.²³ The precise meaning of these phrases is unclear, especially when taken together. The case therefore does not give litigants and the future Court sufficient guidance for deciding whether to modify decrees. Res judicata is a common-law doctrine that takes effect when a court enters a final judgment.²⁴ Later, if a party to the original proceeding brings the same claim again, the claim is precluded. It seems anomalous that the Court would apply this intercase concept to a motion to modify a decree within the same case. At the same time, res judicata is the strongest finality principle on the menu: when it applies, the trial court *lacks power* to entertain

20. See, e.g., Michael Coenen, Comment, *Original Jurisdiction Deadlocks*, 118 YALE L.J. 1003 (2009).

21. See, e.g., Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208 (2013).

22. 460 U.S. 605, 619 (1983).

23. *Id.* at 619, 626.

24. Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929).

the new claim. By invoking “principles of res judicata,” then, the Court seems to suggest that litigants should expect motions for modification to be denied.

If the Court truly applies such a strict finality principle, then decree modifications should be relatively rare, and they should not differ based on the type of original jurisdiction case at issue. Part IV compares these predictions with the Court’s actual practice. Specifically, I report the findings of a survey of all cases on the Court’s original jurisdiction docket from constitutional ratification to the end of 2015. The results indicate that decree modifications are relatively common: of ninety-seven original jurisdiction cases with decrees, decrees have been modified in twenty-eight cases.²⁵ Moreover, the frequency of modification has varied depending on the type of case at issue. The data show that the Court is unlikely to modify its decree in cases establishing interstate boundaries but has regularly modified decrees in water rights cases. These findings suggest that the Court, in assessing motions for modification, has not remained faithful to the res judicata principle it endorsed in *Arizona v. California*.

The Court used a second phrase in *Arizona v. California* as well, seemingly interchangeably with “principles of res judicata”: the Court said it would apply “general principles of finality and repose” to determine whether to modify a decree.²⁶ Part V argues that, if defined by reference to trial courts’ approach to decree modifications throughout history, “general principles of finality and repose” may provide an effective, flexible test for decree modification in original jurisdiction cases. The Part starts with a historical account of the development of motions for decree modification, from Lord Bacon’s ordinances in 1619 through the law-equity merger and Federal Rule of Civil Procedure 60(b)(5). It argues that the Court should apply most of the principles that have been developed in that longstanding line of jurisprudence, rather than “principles of res judicata.”²⁷ The Note concludes with a summary of the test that has emerged from this line of cases and an application of the standard to different types of original jurisdiction cases.

25. Perhaps a superior denominator would be the number of cases in which a modification was actually *sought*. Nevertheless, I decided to use the total number of cases with decrees instead for reasons discussed *infra* Part IV. See *infra* note 159 and accompanying text.

26. 460 U.S. at 619.

27. Although most of the principles developed in this line of cases are applicable to the original jurisdiction, there are exceptions. A few recent decree-modification cases appear to have loosened the test even further in light of federalism concerns that arise in institutional-reform litigation. See, e.g., *Horne v. Flores*, 557 U.S. 433 (2008); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). For reasons explained below, these federalism concerns are not as salient in original jurisdiction cases. See *infra* Part V.

I. THE ORIGINAL JURISDICTION OF THE SUPREME COURT

A. History and Procedure

To understand the Supreme Court's strongly stated commitment to finality in original jurisdiction decrees, one must first understand why the Court considers the original jurisdiction to be unique. The original jurisdiction's history and its modern procedure, which has evolved in reaction to that history, provide valuable context.

In the colonial era, the power to adjudicate disputes between colonial governments was vested in the Privy Council.²⁸ The Articles of Confederation conferred that power on the Congress, with an intricate rigmarole for selecting a panel of between five and nine commissioners to try the case.²⁹ This provision was rarely exercised³⁰ and appears to have resulted in only one final judgment.³¹ The Supreme Court later suggested that both the Privy Council and the Articles of Confederation had been ineffective in resolving interstate-boundary disputes, which had continued since the first colonial settlements.³²

The Constitutional Convention took a different approach. An early draft proposed dividing the power to adjudicate disputes between the Senate and the

28. HANNIS TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION* 152 (1911).

29. ARTICLES OF CONFEDERATION of 1777, art. IX, cl. 2; *see also id.* art. IX, cl. 3 (providing for the use of the same procedure in the case of "controversies concerning the private right of soil claimed under different grants of two or more States").

30. TAYLOR, *supra* note 28, at 152; Robert D. Cheren, *Environmental Controversies "Between Two or More States,"* 31 PACE ENVTL. L. REV. 105, 115 (2014).

31. Cheren, *supra* note 30, at 115; *see* 1 HAMPTON L. CARSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES WITH BIOGRAPHIES OF ALL THE CHIEF AND ASSOCIATE JUSTICES* 75-76 (1904); 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 189 (1971); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1561 n.222 (1990) ("[U]nder the Articles of Confederation the only suit between states ever to reach judgment before the nascent national tribunal established to hear such cases was in fact litigated by a member of Congress. Members of Congress also appeared before the national tribunal in both of the only two other state suits that came before the tribunal, but never reached judgement [sic]." (citations omitted)).

32. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 724 (1838); *see also* 1 JAMES BROWN SCOTT, *JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION: AN ANALYSIS OF CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES* 3 (1919) ("[T]he 9th Article was a prophecy of better things, rather than a realization; for only one case was decided and only one commission was appointed under this procedure; and when the government under the Constitution succeeded the government under the Articles there were controversies between eleven States concerning their boundaries, to mention only differences of this nature, unsettled between the States.").

Supreme Court, with the former deciding boundary disputes and the latter all others.³³ However, the Framers ultimately decided to consolidate the power in the Supreme Court alone.³⁴ The initial plan to divide this power between the Senate and the Supreme Court suggests that the delegates at the Constitutional Convention foresaw that interstate disputes would arise in contexts other than boundary disputes.

As anticipated at the Constitutional Convention, the Court has handled a panoply of other types of original jurisdiction cases,³⁵ but the canonical case has remained the interstate-boundary dispute.³⁶ In these cases, the Court has weighed historical evidence about British land grants or tidal movements to set a precise interstate boundary. It once appointed commissioners to mark the line; today it uses GPS. Another common dispute, a close analogue to the boundary case, is the dispute between a state and the federal government over title to land, such as coastal submerged land; the resolution of such cases can determine important property rights, such as a party's right to drill for oil.³⁷ A third common category of suits, particularly over the past fifty years, might be broadly termed "federalism" disputes: these involve state challenges to the constitutionality of federal statutes, regulations, or policies. For example, South Carolina sued to enjoin enforcement of the Voting Rights Act,³⁸ and Georgia sued to prevent the federal government from impounding certain federal financial assistance to the states.³⁹ Finally, water rights disputes are also

33. SCOTT, *supra* note 32, at 3-4 (1919); *cf. id.* at 3 ("But jurisdiction in the matter of boundaries was only one of the differences which the statesmen [during the time of the Articles of Confederation] foresaw.").

34. U.S. CONST. art. III, § 2, cl. 2; *see also* *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934) ("[T]he States by the adoption of the Constitution, acting 'in their highest sovereign capacity, in the convention of the people,' waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established 'by their own consent and delegated authority' as a necessary feature of the formation of a more perfect Union."). The Court was also given original jurisdiction over another type of case: those involving ambassadors, public ministers, and consuls. U.S. CONST. art. III, § 2, cl. 2. But this provision has not been invoked successfully in more than two centuries. *See supra* note 2 and accompanying text.

35. *See infra* Appendix A.

36. *See, e.g., Louisiana v. Mississippi*, 516 U.S. 22 (1995); *Rhode Island*, 37 U.S. (12 Pet.) at 724.

37. *See, e.g., United States v. California*, 381 U.S. 139 (1965) (regarding title to submerged lands under the Pacific Ocean that had become valuable for their oil); *see also infra* Section V.C.

38. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

39. *McKusick*, *supra* note 3, at 212-13; *see also Georgia v. Nixon*, 414 U.S. 810 (1973) (denying the motion for leave to file a bill of complaint).

becoming increasingly common and relevant.⁴⁰ In some cases, statutes or compacts govern the rights to an interstate body of water;⁴¹ in other cases, water rights are “equitably apportioned” by the Court under a highly discretionary standard.⁴²

In addition to the more common types of disputes, there are a variety of rarely seen cases, including interstate claims for nuisance⁴³ and breach of contract,⁴⁴ disputes about taxes and escheats of unclaimed property,⁴⁵ and state challenges to the legality of other states’ laws,⁴⁶ among others.⁴⁷

Initially, the Supreme Court heard every interstate dispute brought before it, dismissing cases only for the reasons a trial court would dismiss (such as lack of jurisdiction).⁴⁸ This practice is unsurprising given the ancient legal

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40. See, e.g., *Oysters vs. Atlanta; How Exactly Will the Supreme Court Decide How To Divide Water in the ACF Basin?*, SUSTAINATLANTA (July 4, 2015), <http://sustainableatlantaga.com/2015/07/04/oysters-vs-atlanta-how-exactly-will-the-supreme-court-decide-how-to-divide-water-in-the-acf-basin> [<http://perma.cc/WP3J-G9UX>].
 41. See, e.g., *New Jersey v. New York*, 523 U.S. 767 (1998) (relying on the same interstate compact to draw the interstate boundary at Ellis Island); Report by Special Master Paul R. Verkuil at 15, *New Jersey v. New York*, 523 U.S. 767 (No. 120), 1997 WL 291594, at *15 (discussing an interstate compact).
 42. See *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) (“Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle [However, the many factors involved] indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.”).
 43. See, e.g., *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (involving a complaint about noxious gas being discharged from Tennessee into Georgia).
 44. See, e.g., *Virginia v. West Virginia*, 241 U.S. 531 (1916) (involving an interstate debt dispute based on West Virginia’s agreement to take on one-third of Virginia’s debt at the time it seceded from Virginia and entered the Union).
 45. See, e.g., *Delaware v. New York*, 507 U.S. 490 (1993) (establishing the right to escheat unclaimed securities distributions).
 46. See, e.g., *Complaint, Nebraska v. Colorado*, No. 144 (U.S. Dec. 18, 2014), 2014 WL 7474136 (challenging the legality of Colorado’s decriminalization of personal marijuana use); see also *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) (denying the motion for leave to file a bill of complaint).
 47. See, e.g., *Louisiana v. W. Reserve Historical Soc’y*, 465 U.S. 1018 (1984) (denying the motion for leave to file a bill of complaint in a replevin action); *Justices Reject Documents Battle Between Ohio Group, Louisiana*, TOL. BLADE, Feb. 22, 1984, at 3 (providing background on the replevin action); see also *Massachusetts v. New York*, 271 U.S. 65 (1926) (eminent domain); *United States v. Minnesota* 270 U.S. 181 (1926) (patents).
 48. See *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (describing the Court’s development of a discretionary “determin[ation] [of] whether a case is appropriate for [its] original jurisdiction”).

principle that a court with jurisdiction must exercise it.⁴⁹ However, the Court has increasingly declined to exercise its jurisdiction, initially for cases that could be brought in a different forum and later even for cases that could be argued nowhere else.⁵⁰ In *Ohio v. Wyandotte Chemicals Corp.*,⁵¹ the Court defended this discretionary approach. The Court explained that it was an appellate body foremost, and that it was unsuited for fact-finding.⁵² Therefore, the Court requires parties to seek the Court's permission before litigating a case in the original jurisdiction.⁵³ Today, the merits stage of an original jurisdiction dispute is preceded by a gatekeeping stage that bears an uncanny resemblance to petitions for writs of certiorari.⁵⁴ These "motions for leave to file a bill of complaint" are commonly denied.⁵⁵

The Court denies motions for leave to file a bill of complaint more commonly in some types of cases than in others. In particular, the Court will frequently deny motions for leave to file in federalism, tax, contract, and criminal-law cases, as well as cases challenging the constitutionality of state laws.⁵⁶

49. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496-97 (1971) ("[I]t is a time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it.").

50. *Mississippi v. Louisiana*, 506 U.S. at 77 (1992) ("We first exercised this discretion not to accept original actions in cases within our nonexclusive original jurisdiction, . . . [b]ut we have since carried over its exercise to actions . . . where our jurisdiction is exclusive.").

51. 401 U.S. at 493.

52. *Id.* at 498-99 ("What gives rise to the necessity for recognizing such discretion is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court.").

53. *Id.* at 499; see also *Mississippi v. Louisiana*, 506 U.S. at 76 (1992) ("Recognizing the 'delicate and grave' character of our original jurisdiction, we have interpreted the Constitution and 28 U.S.C. § 1251(a) as making our original jurisdiction 'obligatory only in appropriate cases' and as providing us 'with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court.'").

54. See SUP. CT. R. 17.3; *Mississippi v. Louisiana*, 506 U.S. at 76 ("Recognizing the delicate and grave character of our original jurisdiction, we have interpreted the Constitution and 28 U.S.C. § 1251(a) . . . as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." (citation omitted)).

55. See *infra* Appendix A.

56. See *infra* Appendix A. The Court recently denied Nebraska's motion for leave to file a complaint against Colorado for its decriminalization of marijuana. *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016). Justices Thomas and Alito dissented, arguing that the Court's discretionary approach to the original jurisdiction "bears reconsideration." *Id.* at 3 (Thomas, J., dissenting). This is a significant change of position from prior cases, as Justice Thomas conceded. *Id.*

If the Court grants the motion for leave to file a bill of complaint, the plaintiff may file the complaint, which is followed by the defendant's answer and possible counterclaims as in other trial courts.⁵⁷ After the pleading stage, however, the Court generally delegates the bulk of the fact-intensive argument to a special master.⁵⁸ After the parties have presented evidence and argued the issue before the special master, he or she issues a report to the Court, and the parties file exceptions. In this respect, a special master is similar to a magistrate judge in the federal district court. The Court has plenary power to review all issues of law or fact, although it once empaneled a jury for determining the issues of fact.⁵⁹ The Court has always been empowered to handle cases at law and in equity,⁶⁰ so it can grant monetary judgments, equitable decrees, or both. In the case of a decree, that decree will generally continue in perpetuity. Years later, parties may return to request modifications of the decree.⁶¹

B. The Importance of Finality in the Original Jurisdiction

When the Court considers a motion for decree modification, it claims to apply general finality principles and, in particular, principles of *res judicata*.⁶² At first glance, this might seem nonsensical. *Res judicata*, a common-law doctrine, prevents the same parties from bringing the same claim again in a different lawsuit.⁶³ In other words, *res judicata* normally does not apply to a motion to modify a decree *in the same case*. An investigation of the importance of finality in the original jurisdiction sheds some light on why the Court might articulate such a strong principle of finality, even if the stated doctrine would not usually apply.

57. SUP. CT. R. 17.

58. See Carstens, *supra* note 18, at 625 (objecting to this phenomenon).

59. Shelfer, *supra* note 21, at 227-31.

60. U.S. CONST. art. III.

61. See, e.g., *Nebraska v. Wyoming*, 534 U.S. 40 (2001) (modifying a water rights decree for the second time, more than fifty years after the entry of the initial decree).

62. *Arizona v. California*, 460 U.S. 605, 619, 626 (1983).

63. Von Moschzisker, *supra* note 24, at 312 (“[*Res judicata*] constitutes an absolute bar to a subsequent action . . .”). Specifically, if the party won the first action, then that party's subsequent claim will be merged into the initial claim, and only proceedings for the effectuation of judgment will be permitted. If the party lost the first action, then that party's subsequent claim will be barred. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 1213 (11th ed. 2013).

1. *State Parties and Additional Litigation Costs*

In the original jurisdiction, the risk of wasted resources is particularly salient because state and federal coffers carry the burden of litigation.⁶⁴ The Court may be especially interested in protecting the pocketbooks of taxpayers, who likely do not care whether a particular gas station is in North Carolina or South Carolina.⁶⁵ This incentive provides a policy rationale for discouraging relitigation of original jurisdiction cases in particular. Furthermore, given that the Court has frankly expressed that it is ill-suited for fact-finding,⁶⁶ there are even stronger doubts than usual about whether more litigation would produce the “correct” outcome.

In addition to the usual costs of litigation, original jurisdiction cases involve the fees and expenses of court-appointed officials, such as special masters, commissioners, and river masters, which often must be paid by both parties. The Court might be particularly perturbed at taxing court costs against a party who has already “won.”⁶⁷

2. *Judicial Resources*

Even if the states and their taxpayers are willing to bear the costs of this litigation—as might be the case when drought-plagued states sue for water rights—modifying decrees also expends judicial resources. This cost is far more salient in the Supreme Court than in the district courts, given that the Court is

64. Relitigating an issue already decided by a court is also undesirable in nonoriginal jurisdiction cases. A litigated decree has already required the parties to bear the financial burden of fighting through to a merits decision. Furthermore, it is unclear that additional litigation after a final judgment is worth the added cost. See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 445 (1973) (“[T]he expected value of relitigation in enhancing the accuracy of the adjudicative process is (in general) zero.”).

65. See Stephen R. Kelly, *How the Carolinas Fixed Their Blurred Lines*, N.Y. TIMES (Aug. 23, 2014), <http://www.nytimes.com/2014/08/24/opinion/sunday/how-the-carolinas-fixed-their-blurred-lines.html> [perma.cc/JD52-MSGY] (“[The Carolinas’] two-decade effort [to amicably re-mark their boundary] is not complete, and the fate of a gas station whose pumps have surfaced in the ‘wrong’ state could derail the whole thing. But if they succeed, they might well set an example of comity and cooperation for the rest of our head-butting nation.”).

66. See *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971).

67. *Infra* Appendix B lists scores of Court orders dealing solely with masters’ compensation.

a bottleneck institution, hearing oral argument in less than one percent of the cases for which petitions for writs of certiorari are filed.⁶⁸

In appellate cases, the Supreme Court can protect its calendar by instituting gatekeeping procedures and circumscribing the parties with limits on filing length, oral argument time, and so forth. In original jurisdiction cases, however, the Court is a trial court and must consider and rule on each issue of fact. The Justices are conscientious about this; the Court's opinion in *New Jersey v. New York* conjures up a mental image of The Nine peering over one another's shoulders as they scrutinize hoary maps to discern whether a certain pier was built on filled land.⁶⁹ In reality, much of the fact-finding is delegated to a special master,⁷⁰ but the Court must rule on every exception to the special master's report. And one cannot rule out the possibility—however remote—of a party demanding a jury trial.⁷¹

Such fears animated the Court's decision to introduce discretionary denials of motions for leave to file bills of complaint.⁷² The Court might ascribe its use of a particularly strong finality principle to its need for a similar gatekeeping function after a case has been decided.⁷³

3. Reliance Interests

A third type of cost in modifying decrees is that there are often reliance interests. Whether in district courts or the original jurisdiction, these reliance interests are especially important when all taxpayers have acted in reliance on the prior decree.⁷⁴ Furthermore, in the original jurisdiction, more than money is at stake: reliance can come in the form of legislation by a state government. A state that has built a dam or power plant based upon its understanding of a water rights decree has sunk both financial and political capital into the project.

68. See *Frequently Asked Questions*, SUP. CT. U.S. (2014), <http://www.supremecourt.gov/faq.aspx> [<https://perma.cc/6PG5-KQKP>] (estimating that ten thousand petitions for writs of certiorari are filed each year, with oral argument occurring in just seventy-five to eighty cases).

69. 526 U.S. 589, 589–90 (1999).

70. See Carstens, *supra* note 18.

71. See Shelfer, *supra* note 21 (describing the only jury trial over which the Court has presided).

72. See *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498–99 (1971).

73. See generally *id.* (discussing the motivations for gatekeeping by denying original jurisdiction cases over which the Court admittedly has jurisdiction); McKusick, *supra* note 3 (describing the similar use of motions for leave to file bills of complaint as a gatekeeping function).

74. See, e.g., Report of Special Master Elbert P. Tuttle at 38–46, *Arizona v. California*, 460 U.S. 605 (1983) (No. 8) [hereinafter Tuttle Report].

In the event of a decree modification, it may lack sufficient political support to revisit the issue.

4. *Encouraging Settlement and Avoiding Enforcement Issues*

The Supreme Court's preference for negotiation over adjudication in original jurisdiction cases also provides a reason to adopt a strong finality standard.⁷⁵ Because original jurisdiction cases involve litigation between sovereigns, they carry an unusually high risk of noncompliance.⁷⁶ Consent decrees, in which parties settle and ask courts to memorialize their agreement with an injunction carrying the force of law,⁷⁷ avoid the expenses of a lengthy trial. But more importantly, compromise makes it less likely that the Court will have to independently enforce the decrees.

Frequently modifying consent decrees when one party is unhappy with its prior agreement would discourage settlement negotiations⁷⁸ and increase the

75. See, e.g., *Montana v. Wyoming*, 135 S. Ct. 1479, 1479 (2015) (mem.) (“The Master’s Report and submissions of parties indicate that fees and expenses could well exceed any recovery. Parties are therefore directed to consider carefully whether it is appropriate for them to continue invoking the jurisdiction of this Court.”). The Court has allowed settlements even on thorny issues like its own jurisdiction. See *infra* Section II.B (discussing the Court’s acquiescence in a decree modification that altered the jurisdiction-savings clause it had entered in its earlier decree in *Nebraska v. Wyoming*, 345 U.S. 981, 981 (1953)).

76. One case in which such a risk materialized was *Virginia v. West Virginia*, 220 U.S. 1 (1911). The Court, having been pressed to rule on whether West Virginia owed Virginia a debt based upon certain agreements entered into at the time of West Virginia’s creation, admonished: “Great states have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end.” *Id.* at 36. Instead, a decade of additional litigation ensued, with the Court nearly having to decide whether it could issue a writ of mandamus to compel West Virginia to levy a tax and pay its debt. See *Virginia v. West Virginia*, 246 U.S. 565 (1918); see also *Wisconsin v. Illinois*, 289 U.S. 395, 411 (1933) (determining upon the special master’s submission that Illinois was deliberately failing to raise the necessary funds to comply with a decree, the Court enlarged that decree to command that “the state of Illinois is hereby required to take all necessary steps, including whatever authorizations or requirements, or provisions for the raising, appropriation, and application of moneys, may be needed” to comply with this decree); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 694 (1838) (“Mr. Justice BARBOUR asked Mr. Hazard, if he could point out any process by which the Court could carry a final decree in the cause into effect, should it make one. For instance, if an application should be made by Rhode Island for process to quiet her in her possession, what process could the Court issue for that purpose?”).

77. Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275 (2010).

78. See Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1129 (1986) (“If a later modifying court can lightly cast

risk that the Court would face an enforcement standoff in the future. Furthermore, consent decrees need not contain findings of fact or conclusions of law, so it may be even more difficult for the Court to recognize whether there has been a relevant change since the entry of the decree that might justify a departure from its terms.⁷⁹

While these reasons make finality especially important in original jurisdiction cases, a strict finality principle is not a panacea. The Supreme Court must consider and rule on each modification request. Even a strong finality principle will not fully ameliorate concerns about litigation costs and judicial resources. A strong finality principle, moreover, has its own costs, especially in cases affecting entire states. The next Part illustrates how changed circumstances may justify modification of decrees despite the Court's stated finality principle and the principle's policy rationales.

II. COMPARING RELEVANCE OF CHANGED CIRCUMSTANCES IN BOUNDARY DISPUTES AND WATER RIGHTS CASES

The contrast between boundary disputes and water rights cases—two types of frequently litigated original jurisdiction cases—illustrates that the Court has deviated from its stated strict finality principle in certain categories of cases but not others. A careful examination of these two types of cases also shows that the Court has engaged in a more traditional inquiry of examining changed circumstances in facts and law when deciding whether to modify a decree.

A. *Boundary Disputes and the Specter of War*

The Court almost never modifies boundary-related decrees.⁸⁰ Consider *Rhode Island v. Massachusetts*, a boundary-dispute case from 1838,⁸¹ in which Massachusetts asked the Court to ignore the pre-Revolution series of charters and letters that set the disputed boundary because to do otherwise would be to grant Great Britain enduring power inconsistent with the American states'

aside the terms of consent decrees, parties will be deterred from entering judgments by consent, and an efficient form of dispute resolution will be discouraged.”).

79. See *id.* at 1129–31 (1986).

80. The Court has considered fifty-seven boundary cases, entering decrees in forty-two of them. Of these, it has only modified four. See *infra* Appendix A.

81. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) at 658.

hard-won independence.⁸² These concerns did not persuade the Court, which held that such a long-standing boundary should not be disturbed.⁸³ In considering this case, the Court was confronted with factors unique to boundary determinations. Most importantly, border conflicts carry with them the specter of armed invasion.⁸⁴ Therefore, the finality of borders is essential to protecting peace. Inasmuch as states would contemplate war over any original jurisdiction dispute, boundaries are particularly likely to cause war because they implicate a primal sovereign right to the soil.⁸⁵ In contrast, disputes over water rights generally do not provoke the same sovereignty concerns. Moreover, water rights cases are a modern phenomenon,⁸⁶ and, Texas separatists notwithstanding,⁸⁷ interstate war is not a modern concern.⁸⁸

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82. *Id.* at 679 (noting that, in the view of the respondent state, the boundary determinations of the Crown have no more legal force than the globe-dividing bull of Pope Nicholas V or the similar proclamation of Alexander VI).
 83. *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 638 (1846) (applying the principle, announced earlier by the man who would become Lord Mansfield, that the tribunal should not “disturb” an interstate agreement if the agreement had stood for many years).
 84. *See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) at 658 (“[Boundary disputes cannot] be settled without war or treaty which is by political power; but, under the old and new confederacy, they could and can be settled by a court constituted by themselves”); *see also Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983) (“The model case for invocation of this Court’s original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.”).
 85. One relatively late example was the so-called “Honey War,” in which several beehives were harmed, a tax collector was jailed, and hundreds of troops were gathered. Craig Hill, *The Honey War*, 14 PIONEER AM. 81, 83-84 (1982). “Governor Lucas of Iowa warned the Legislative Assembly in 1838 that ‘this dispute may ultimately lead to the effusion of blood,’” but it appears that bloodshed was avoided. *Id.* The Supreme Court took up the case in *Missouri v. Iowa*, 48 U.S. (7 How.) 660 (1849).
 86. *Kansas v. Colorado*, 206 U.S. 46, 80 (1907) (“This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporeal rights are claimed by the respective litigants.”). This appears to have been the first water rights case, although cases related to the *obstruction* of interstate rivers are much older. *See, e.g., Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 626-27 (1851) (decree to alter a bridge).
 87. Manny Fernandez, *Secede? Separatists Claim Texas Never Joined United States*, N.Y. TIMES (Mar. 9, 2015), <http://www.nytimes.com/2015/03/10/us/secede-republic-claims-texas-never-joined-us.html> [<http://perma.cc/3B9M-YQ9R>] (“[Federal officials] noted that those with ties to the [so-called ‘Republic of Texas’] group have taken their nationalist beliefs to violent extremes in the past, including a seven-day standoff with the authorities in 1997 that ended with a gun battle in which one group member was killed.”).
 88. The Court has nevertheless alluded to the threat even in twentieth-century cases. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945) (“The dry cycle which has continued over a decade has precipitated a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war.”).

Furthermore, in some original jurisdiction disputes, such as water rights cases, the governing principle is “equitable apportionment.”⁸⁹ When adjudicating boundary disputes, on the other hand, the Court has announced that equitable factors are not relevant.⁹⁰ The underlying rationale seems to be that boundaries are set by historical accident, rather than through a weighing of equities. If the Court were to revise these historical dictates, even for good reason, it would be impermissibly poaching a state’s territory. In one illustrative case, the Court rejected a special master’s suggestion that it bend a boundary around a building, even though drawing a state boundary through the building would inconvenience all involved.⁹¹

A final unique aspect of boundary cases is that compromises are far less straightforward in such cases than in other original jurisdiction cases.⁹² Boundaries determine jurisdiction; they implicate a state’s very power to act. For this reason, the Court takes a formalist approach to boundaries instead of weighing equities. This limit on the Court’s power might, *a fortiori*, restrict parties’ abilities to compromise in boundary cases. The rationale might be compared to the principle that parties may not stipulate to a court’s subject-matter jurisdiction; similarly, states may not stipulate into existence their sovereignty over a particular patch of soil. Furthermore, boundary compromises in an original jurisdiction case might be seen as an attempt to impinge upon the province of Congress: ordinarily, such compromises would be done through the Compacts Clause.⁹³ For these reasons, consent decrees in boundary cases are on shaky ground.

The “principles of *res judicata*” to which the Court alluded in *Arizona v. California* might seem well-suited to boundary dispute cases. As a descriptive matter, boundary-case decrees are rarely altered. As a normative matter, this

89. See, e.g., *Colorado v. New Mexico*, 459 U.S. 176, 183-88 (1982) (collecting cases on equitable apportionment in water rights cases); *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380 (1980) (allowing an unusual action to proceed for the equitable apportionment of fish).

90. *New Jersey v. New York*, 523 U.S. 767, 811-12 (1998) (holding that where an interstate compact and historical evidence demonstrated the location of a boundary, equitable considerations could not justify even slight modifications).

91. *Id.*

92. See, e.g., *id.* at 780 (rejecting the special master’s suggestion to draw boundary lines around buildings on Ellis Island, because “the Court ha[s] no authority to modify that line to address considerations of practicality and convenience.”). But see *Texas v. Louisiana*, 426 U.S. 465, 467 (1976) (per curiam) (approving a special master recommendation “[t]hat the boundary [in a particular region] be established [as described], with the right to the States of Texas and Louisiana to alter such boundary within Sabine Lake by agreement within the time proposed” (emphasis added)).

93. See, e.g., *Kansas v. Missouri*, 340 U.S. 859, 859 (1950) (modifying a decree in light of an interstate compact).

approach is defensible: if states cannot compromise and equities were never involved in setting boundaries in the first place, the most efficient path to dispute resolution might be a binding, unassailable decree.⁹⁴

B. Water Rights and Changed Circumstances

Water rights cases are not like the canonic boundary-dispute cases: they afford the possibility of compromise and have not historically invoked fears of interstate war. For these reasons, the Court has balanced equities in these cases and frequently modified decrees when changed circumstances warranted the rebalancing of those equitable factors.⁹⁵

*Nebraska v. Wyoming*⁹⁶ illustrates the Court's balancing of equities in water rights cases and its resulting frequent modification of decrees. In 1934, a thirsty Nebraska sued Wyoming in the original jurisdiction (with Colorado later impleaded as a defendant), seeking equitable apportionment of the North Platte River.⁹⁷ The Court ruled that prior appropriation would serve as a loose guiding principle,⁹⁸ and it entered a decree.⁹⁹ The decree enjoined Colorado and Wyoming from storing or diverting more than a specified amount of water, set priorities among various canals and federal reservoirs, and explicitly apportioned the flows in a particularly contentious stretch of river during the irrigation season.¹⁰⁰ The Court reserved jurisdiction to modify the decree as it saw fit.¹⁰¹

94. The flexible test would produce a similar degree of finality in most boundary dispute cases because there would be no relevant changed circumstances. There are rare instances where modifications become necessary in boundary disputes, though, and the flexible test is superior in such cases. See *infra* Section V.C.

95. In that sense, water rights cases bear resemblance to a different type of action: institutional-reform litigation in district courts. As explained *infra* Section V.B, courts have been known to fashion intricate decrees to ensure that the plaintiffs' constitutional rights are vindicated, but also allowed for modifications of these decrees in light of changed circumstances. Part V suggests that some, though not all, of the lessons the Court has learned in the institutional-reform context could be applied in the original jurisdiction, guiding the Court's finality determinations.

96. 515 U.S. 1 (1995).

97. See *id.* at 4.

98. See *id.* at 5.

99. *Nebraska v. Wyoming*, 325 U.S. 589, 665-72 (1945).

100. *Id.* at 665-69.

101. *Id.* at 671.

The parties returned to the Court soon after, with a joint motion to modify the decree in light of a new dam and reservoir.¹⁰² The Court entered the modified decree without a whisper about *res judicata*.¹⁰³ In 1995, more than three decades later, Nebraska returned with requests for additional relief related to tributaries and groundwater that were hydrologically linked to the North Platte, and for more detailed apportionment during the nonirrigation season.¹⁰⁴ The Court, after citing its reservation of jurisdiction in the decree, explained, “The parties may . . . not only seek to enforce rights established by the decree, but may also ask for ‘a reweighing of equities and an injunction declaring new rights and responsibilities’”¹⁰⁵ The Court allowed some claims to go forward, including one claim to modify the decree to prevent Wyoming from performing certain developments that would “upset the equitable balance”¹⁰⁶ established in the decree and another to enjoin the use of a new technology—increasingly pervasive groundwater pumping, which the Court characterized as “a change in conditions posing a threat of significant injury.”¹⁰⁷

After the Court allowed these claims to go forward, the parties reached a comprehensive settlement. The Court modified the prior decree in accordance with that settlement in 2001.¹⁰⁸ Though *Arizona v. California* was on the books by then, the Court did not express a concern that it lacked jurisdiction due to principles of *res judicata*.

Nebraska v. Wyoming demonstrates the importance of equities in the water rights context and the significance of the parties’ ability to compromise. In one of the consent decrees, the Court even allowed a modification of its jurisdiction-saving clause that barred Colorado from requesting additional modifications for a period of five years, as if the Court’s jurisdiction were something a state could bargain away.¹⁰⁹ Surely such a permissive regime is not what “principles of *res judicata*” suggests.¹¹⁰

102. See Order Modifying and Supplementing Decree, *Nebraska v. Wyoming*, 345 U.S. 981, 981-82 (1953) (No. 5).

103. *Id.*

104. *Nebraska v. Wyoming*, 515 U.S. 1, 5-6 (1995).

105. *Id.* at 9 (quoting *Nebraska v. Wyoming*, 507 U.S. 584, 593 (1993)).

106. *Id.* at 12.

107. *Id.* at 14.

108. *Nebraska v. Wyoming*, 122 S. Ct. 585 (2001) (mem.). The parties apparently negotiated a more detailed settlement with respect to a particular apportionment, and on joint motion the Court further modified its decree in 2012. *Nebraska v. Wyoming*, 132 S. Ct. 1072 (2012) (mem.).

109. Order Modifying and Supplementing Decree, *supra* note 102, at 981 (striking the beginning of the jurisdiction-saving clause and “substituting for it the following: Any of the parties

In *Wisconsin v. Illinois*, another case with intriguing decree modifications that bear no resemblance to *res judicata*, the Court was forced to take drastic action to protect public welfare.¹¹¹ In 1929, Wisconsin sought relief from the Court, claiming that Chicago was pumping water from Lake Michigan for sanitary purposes, to the detriment of the Great Lake states.¹¹² The Court held this diversion illegal, but acknowledged the defendant's public-health concerns.¹¹³ Within a year, pursuant to a special master's findings, the Court entered a decree requiring Chicago to gradually decrease its water use over the following eight years.¹¹⁴ In 1933, after the special master reported that Illinois was unjustifiably failing to take steps to follow the decree, the Court expanded the decree to order Illinois to raise the necessary funds.¹¹⁵ Then, in 1940, the Court learned that substantial amounts of sewage sludge had accumulated.¹¹⁶ The parties stipulated that Chicago would be permitted ten days of greatly increased water usage to attempt to dislodge the muck, and the Court modified its prior decree in accordance with that stipulation.¹¹⁷ But with a hydrological network as complex as the Great Lakes Basin, another emergency followed two decades later. The Mississippi River fell to a dangerously low level, causing navigational emergencies, and the Court ordered a temporary modification of the decree to help alleviate the crisis.¹¹⁸ That same day, the Court referred the matter to an individual justice, Justice Burton, "with power to act" on behalf of the whole Court.¹¹⁹ The modification was again extended in a similar fashion as the crisis continued.¹²⁰

In both *Nebraska v. Wyoming* and *Wisconsin v. Illinois*, the Court displayed a willingness to modify decrees when changed circumstances justified

may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years . . . the State of Colorado shall not institute any [such] proceedings").

110. The standard that this Note recommends for original jurisdiction cases, on the other hand, would permit flexibility in this case because a change in facts will have rendered the original decree insufficiently effective in vindicating the litigants' rights. See *infra* Part V.

111. See *infra* text accompanying notes 116-120.

112. *Wisconsin v. Illinois*, 281 U.S. 179, 196 (1930).

113. *Id.*

114. *Wisconsin v. Illinois*, 281 U.S. 696 (1930) (decree).

115. *Wisconsin v. Illinois*, 289 U.S. 395, 411, 412 (1933).

116. *Wisconsin v. Illinois*, 311 U.S. 107, 107 (1940) (order).

117. *Id.* at 110-11.

118. See *Wisconsin v. Illinois*, 352 U.S. 945, 947 (1956) (per curiam). The Court does not state that all parties consented to the modification. *Id.*

119. *Wisconsin v. Illinois*, 352 U.S. 947, 947 (1956) (per curiam).

120. *Wisconsin v. Illinois*, 352 U.S. 983, 983 (1957) (per curiam).

modification.¹²¹ It did not believe that it was prevented from doing so because of *res judicata*, nor did it mention that it was guided in its decision making by principles of *res judicata*.¹²² As discussed above, *res judicata* is an absolute doctrine,¹²³ and it does not allow the weighing of equities. If the Court had applied principles of *res judicata*, it likely would have refused at least some of the modifications requested in these two cases.

Moreover, applying a strict finality principle would have been normatively undesirable in the cases described above. These cases demonstrate the importance of the Court's choice of finality principles. In each dispute, enforcing the old decree in the face of changed circumstances would have been contrary to the purpose of the original decree, or led to consequences unforeseen and unintended at the time of adopting the original decree. If the Court had applied principles of *res judicata* and chosen not to allow Chicago to dislodge its sewage sludge, substantial public-health consequences could have followed. Similarly, if the Court had rigidly clung to its prior decree despite new irrigation technologies in *Nebraska v. Wyoming* or despite unforeseen hydrological changes in *Wisconsin v. Illinois*, the economic implications would have been far-reaching. These examples also show that because unforeseeable changes in circumstances are particularly likely in water rights cases, a strict finality principle is much less desirable than in boundary-dispute cases. This means that not only does the Court modify decrees at different rates in different types of cases, but also that the stated approach of the Court in original jurisdiction cases is neither workable nor equitable, as discussed in Part III.

III. THE SUPREME COURT'S PURPORTED APPROACH TO ORIGINAL JURISDICTION DECREE MODIFICATION

The previous two Parts have enumerated the finality interests at stake and illustrated that decree modifications are nevertheless essential in some cases. This Part turns to the Supreme Court's attempt to balance these issues in *Arizona v. California*, the only case in which the Court has discussed its approach to requests for modification of decrees in original jurisdiction cases in

121. *Nebraska v. Wyoming*, 515 U.S. 1, 11-12 (1995); *Wisconsin v. Illinois*, 352 U.S. 945, 947 (1956) (per curiam).

122. The relevant opinion in *Nebraska v. Wyoming* postdates *Arizona v. California*, so a change in law cannot be the explanation for this incongruence. Compare *Nebraska v. Wyoming*, 122 S. Ct. 585 (2001) (mem.), with *Arizona v. California*, 460 U.S. 605, 619 (1983).

123. Von Moschzisker, *supra* note 24, at 312 ("[*Res judicata*] constitutes an absolute bar to a subsequent action . . .").

detail.¹²⁴ The case began in 1952 when Arizona invoked the Court's original jurisdiction over a dispute with California regarding the states' rights to use the waters of the Colorado River;¹²⁵ Nevada, Utah, and New Mexico also joined the suit.¹²⁶ The United States intervened in the case to seek water rights on behalf of certain federal lands, including Indian reservations.¹²⁷ As in most original jurisdiction cases, the Court referred the case to a special master.¹²⁸

The *Arizona v. California* Court ruled that water rights in the Colorado River were governed by the Boulder Canyon Project Act of 1928¹²⁹ and that prior to that Act, the United States had reserved water rights for the Indian reservations.¹³⁰ Because the reservations had already been created as of the date of the Boulder Canyon Project Act, the reservations' water rights were "present perfected rights" and therefore received priority.¹³¹ The Court adopted the special master's findings with respect to precise acreages and entered a decree apportioning water rights in the river.¹³² The Court included a generalized jurisdiction-saving clause, Article IX of the decree, which would later give rise to its discussion of finality:

Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.¹³³

124. 460 U.S. 605.

125. *Arizona v. California*, 344 U.S. 919, 919 (1953) (order).

126. *Arizona v. California*, 350 U.S. 114, 115 (1955) (per curiam); *Arizona v. California*, 530 U.S. 392, 397 (2000).

127. See *Arizona v. California*, 530 U.S. at 397.

128. *Id.* A special master presides over an original case much like a trial judge; parties may file exceptions to the special master's findings, and the Court reviews the special master's factual and legal determinations de novo. Rapp, *supra* note 18, at 2-3 ("Masters do not have the power to decide issues of fact; they can only submit advisory recommendations for fact-finders that are subject to exceptions and objections by the parties.").

129. 43 U.S.C. § 617 (2012).

130. See *Arizona v. California*, 373 U.S. 546, 598-600 (1963).

131. *Id.* at 600.

132. See *Arizona v. California*, 376 U.S. 340, 342-43 (1963) (decree); *Arizona v. California*, 373 U.S. at 600-01.

133. *Arizona v. California*, 376 U.S. at 353 (decree). For different approaches to jurisdiction-saving measures, see, for example, *New Jersey v. Delaware*, 552 U.S. 597, 624 (2008), which enters a shorter and broader jurisdiction-saving clause, allowing the Court to act "as it may from time to time deem necessary or desirable to give proper force and effect to this Decree or to

In 1978, the United States joined several tribes in moving for additional water rights for the reservations, conceding that the federal government had done a poor job representing their interests earlier in the litigation.¹³⁴ The Court referred the motion to a newly appointed special master, Elbert P. Tuttle, a senior judge of the Fifth Circuit.¹³⁵ Before Tuttle, the states argued that the motion was barred by *res judicata*;¹³⁶ the tribes and the federal government countered by invoking a different finality principle: law of the case.¹³⁷

Law of the case is a traditional principle of common law. But unlike *res judicata*, it is “a discretionary rule of practice,” not a “uniform rule” of procedure.¹³⁸ It is based on the notion that “when an issue is once litigated and decided, that should be the end of the matter.”¹³⁹ In Supreme Court jurisprudence—appellate and original—law of the case has very little substance; it is mainly an expression of courts’ general preference for finality.¹⁴⁰ Special Master Tuttle reasoned that Article IX “contains no limiting language,”¹⁴¹ so the Court must have great discretion over whether to modify its prior decree. Special Master Tuttle observed that law of the case principles

effectuate the rights of the parties”; and *New Jersey v. New York*, 347 U.S. 995, 1005 (1954) (per curiam), which adds to its jurisdiction-saving clause that failure to file exceptions to the special master’s report would not estop the party from requesting a modification. While jurisdiction-saving clauses provide evidence that the Court anticipated that modifications might be necessary, the Court has been willing to modify decrees even when such clauses were not present in the initial decree. See, e.g., *Wyoming v. Colorado*, 259 U.S. 49 (omitting any jurisdiction-saving clause), *decree modified*, 260 U.S. 1 (1922), *decree vacated and new decree entered*, 353 U.S. 953 (1957).

134. See *Arizona v. California*, 530 U.S. 392, 404-05 (2000).

135. *Arizona v. California*, 439 U.S. 419, 436 (1979) (per curiam) (supplemental decree).

136. Tuttle Report, *supra* note 74, at 30 & n.1.

137. *Id.* at 36 & n.9.

138. *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 199 (1950); see also *Higgins v. Cal. Prune & Apricot Grower, Inc.*, 3 F.2d 896, 898 (2d Cir. 1924) (“[I]t is now well settled that the ‘law of the case’ does not rigidly bind a court to its former decisions, but is only addressed to its good sense.” (citations omitted)).

139. *U.S. Smelting*, 339 U.S. at 198.

140. See, e.g., *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (“[T]he phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided . . .”).

141. Tuttle Report, *supra* note 74, at 34. He also reasoned that the Court had to have intended to give itself *some* additional power with Article IX; the Court already has inherent power to correct clerical errors. See *id.*

should govern the Court's discretion.¹⁴² Thus, he concluded, law of the case was the best finality principle to apply in this sort of case.¹⁴³

This is not a particularly persuasive argument, and Tuttle himself admitted uncertainty about the correct principle to apply.¹⁴⁴ The Court declined to adopt his reasoning, explicitly avoiding the contentless law of the case doctrine: "To extrapolate wholesale law of the case into the situation of our original jurisdiction, where jurisdiction to accommodate changed circumstances is often retained, *would weaken to an intolerable extent the finality of our Decrees* in original actions."¹⁴⁵ The Court denied the tribes' motion in the interest of finality.¹⁴⁶ In its opinion, the Court claimed that it had applied "principles of res judicata" to determine whether it would allow relitigation of the issue.¹⁴⁷

The Court's reference to "principles of res judicata" might be read in two ways. First, the Court might simply mean that the correct finality principle to apply is the principle of res judicata. In some cases on its appellate docket, the Court has used the phrase "principles of res judicata" in this way.¹⁴⁸ Passages in *Arizona v. California* similarly suggest that the Court is applying res judicata in full force.¹⁴⁹ For instance, the Court found that it did not have to balance

142. *Arizona v. California*, 460 U.S. 605, 618 (1983); cf. *Higgins*, 3 F.2d at 897 (holding that, though law of the case "is only addressed to [the Court's] good sense," the Court retains "a right to change its mind").

143. Tuttle Report, *supra* note 74, at 35-36.

144. Tuttle Report, *supra* note 74, at 35. ("The precise definition of the finality principle applicable to this case appears to be somewhat cloudy. No party has offered an explanation or authority that seems fully satisfactory.").

145. *Arizona v. California*, 460 U.S. at 618-19 (emphasis added).

146. *Id.* at 643.

147. *Id.* at 626.

148. See, e.g., *McCarren v. Springfield*, 464 U.S. 942, 944 (1983) (Rehnquist, J., dissenting from denial of certiorari) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982))); *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399 (1981) ("In this case, the Court of Appeals conceded that the 'strict application of the doctrine of *res judicata*' required that *Brown II* be dismissed The court, however, declined to dismiss *Brown II* because, in its view, it would be unfair We believe that such an unprecedented departure from accepted principles of res judicata is unwarranted.").

149. *Arizona v. California*, 460 U.S. at 626 ("Because we have determined that the principles of res judicata advise against reopening the [decree], and that Article IX does not demand that we do so, *it is unnecessary to resolve* the bitterly contested question of the extent to which States have detrimentally relied on the 1964 Decree." (emphasis added)).

equities.¹⁵⁰ Is that because *res judicata*, or a similar principle, had removed the Court's power to balance equities? No, the Court explained: "[Article IX] grants us power to correct certain errors, to determine reserved questions, and if necessary, to make modifications in the Decree."¹⁵¹

The Court's acknowledgment that it has power to make modifications suggests that it meant "principles of *res judicata*" in a more general sense. This reading is supported by a different phrase the Court used: "[Article IX] should be subject to *the general principles of finality and repose*, absent changed circumstances or unforeseen issues not previously litigated."¹⁵² This phrase, though similarly lacking in precedent, suggests a degree of discretion and of equity-balancing that *res judicata* would forbid. Part V will attempt to give content to this phrase by arguing for a superior finality principle for decree modification that also reflects the Court's practice.

IV. WHEN DOES THE SUPREME COURT ACTUALLY MODIFY ITS DECREES?

In light of the ambiguity discussed above surrounding the Court's invocation of "principles of *res judicata*," it seems safe to conclude that the *Arizona* Court failed to articulate a clear finality principle. If the Court was articulating a strict finality principle, one would expect to see relatively few decree modifications; furthermore, because *res judicata* does not take equities into account, adhering to a strict principle of *res judicata* would mean that the frequency of decree modifications would not vary much from one case type to the next.

However, as we have already seen in the water rights examples,¹⁵³ the Court does not always follow a strict finality principle in practice. In this Part, I

150. "Detrimental reliance is certainly relevant in a balancing of the equities when determining whether changed circumstances justify modification of a Decree . . . [B]ut even the absence of detrimental reliance cannot open an otherwise final determination of a fully litigated issue. Finality principles would become meaningless if an adversarially determined issue were final only if the equities were against revising it." *Id.*

151. *Id.* at 618. The Court claimed that, if not for the Article IX jurisdiction-saving clause of the original decree, *res judicata* would have applied full force to this case, rendering the Court "without power to reopen the matter." *Id.* at 617. This cannot be right: *res judicata* does not apply when a party returns to the original court in the same case to apply for relief from judgment. In fact, in other original jurisdiction cases, the Court has modified decrees despite the fact that they did not contain a jurisdiction-saving clause. *See, e.g., Wyoming v. Colorado*, 259 U.S. 496 (1922), *decree modified*, 260 U.S. 1 (1922), *decree vacated and new decree entered*, 353 U.S. 953 (1957).

152. *Arizona v. California*, 460 U.S. at 619 (emphasis added).

153. *See supra* Section II.B.

resolve these empirical questions of how often and when the Court modifies its own decrees by expanding the analysis to the entire universe of original jurisdiction cases. I first updated the lists of original case activity begun by a student author in 1959 and continued by retired Maine Supreme Court Justice, and sometime Special Master, Vincent L. McKusick in 1993.¹⁵⁴ With a complete list of every original case, I divided these cases into nineteen categories by subject matter.¹⁵⁵ For each case, I noted the dispositive actions taken by the Court and classified the case based on its resolution. These resolutions are: motion for leave to file denied; dismissed (including withdrawn); unknown resolution or long inactive; ongoing; temporary relief only; merits (no decree); decree: never modified; and decree: modified.¹⁵⁶

As Appendix A demonstrates, the Court disposes of different cases in different ways. In some categories, such as federalism, constitutionality of state laws, interstate contracts, and criminal law, the majority of claims are over before they even begin because the Court usually denies leave to file a bill of complaint.¹⁵⁷ In other categories, such as interstate boundaries, water rights, and federal-state title disputes, the Court almost never denies leave to file.

To more closely examine the finality of judgments, I focused on cases that resulted in at least one decree. I divided such cases into two groups: cases that resulted in a decree that has remained final and cases that resulted in a decree that has since been modified, replaced, or supplemented. The results are striking.¹⁵⁸ The Court has entered decrees in forty-two interstate-boundary cases, but has modified only four of them. The Court has entered decrees in

154. The student work includes all original jurisdiction activity through 1959. Note, *supra* note 3. This task was continued by McKusick's article, which includes all original case activity through April 25, 1993. McKusick, *supra* note 3. I have updated these authors' compilations by cataloguing all activity in original cases from April 25, 1993 through December 31, 2015. See *infra* Appendix B.

155. These categories are: interstate boundaries; federalism; water rights; federal-state title disputes; taxes; purported original jurisdiction cases; constitutionality of state laws; interstate nuisance; corporate activities (liquidation, merger, etc.); interstate contracts; state-citizen title disputes; riparian rights & obstruction of waterways; escheat of unclaimed property; bonds; criminal law (extradition, death penalty); state-citizen debt disputes; consul cases; miscellaneous (replevin, tort, interstate debt dispute, procedure, etc.); and unknown controversies. See *infra* Appendix A.

156. See *infra* Appendix A.

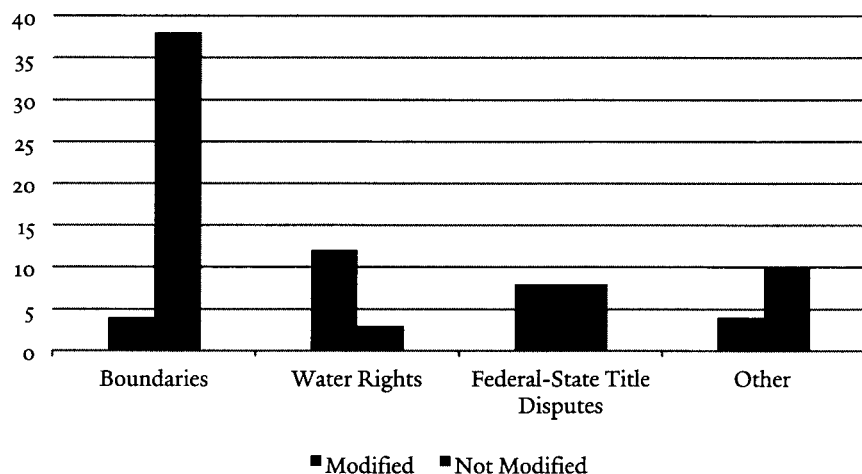
157. In original cases, the Court requires litigants to convince the Court that it should exercise its jurisdiction through a motion for leave to file. See generally *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971). As McKusick recognized, this allows the Court to serve as a discretionary gatekeeper, conforming its original jurisdiction procedures to the procedures it applies to its appellate docket. See McKusick, *supra* note 3, at 188-90.

158. See *infra* Appendix A.

sixteen federal-state title dispute cases, and has modified eight of them. In water rights disputes, the Court has entered decrees in fifteen cases and has modified twelve of them. In all other categories, it has entered a total of fourteen decrees and has modified four of these decrees. These results are displayed in Figure 1.

Figure 1.

DECREE MODIFICATIONS BY CASE TYPE



These data are inconsistent with the notion that the Court has applied a res judicata-like finality principle to requests for decree modification. First, the Court frequently modifies decrees. Out of 263 total cases, the Court has entered decrees in ninety-seven cases. In twenty-eight of these ninety-seven cases—nearly one-third—the Court has modified a decree.

Furthermore, these data take a relatively strict definition of “modify.” For instance, in several boundary cases, the Court entered a decree establishing an interstate boundary and then entered another decree decades later requiring that the boundary be remarked because the old markings had faded. In some cases, the second decree appointed commissioners to mark the boundary based on where the first commissioners had done so—rather than in accordance with the original boundary determination. Technically, this could be read as a decree modification, but I chose to categorize such cases as decrees with no

modification. Even under this strict definition, thirty-two percent of all decrees were modified.¹⁵⁹

Moreover, the rate at which the Court modifies decrees varies across different categories of original jurisdiction cases. In other words, the Court is disproportionately willing to modify decrees in some types of cases and disproportionately unwilling to do so in others. Part V, building on this finding, argues that some types of cases involve circumstances that justify re-considering a decree more than others. Whatever principle guides the Court's decision-making in these cases, it does not resemble *res judicata*.

There is one additional wrinkle to consider: could it be that the Court's invocations of *res judicata* are protective, designed to ward off litigants who might otherwise seek modification? The Court has expressed a need to guard itself against the drain on resources that the original jurisdiction produces: motions for leave to file bills of complaint are a good example of this preference.¹⁶⁰ Perhaps the Court's behavior does not align with its language because it has announced a rule that is designed to be as discouraging as possible to parties who would otherwise seek decree modification. If so, there might be some value in that subterfuge, but a misalignment between the Court's statements and its actions could eventually provoke skepticism and distrust. The following Part assumes that the Court hopes to prescribe a standard that is consistent with the Court's behavior.

V. LOCATING "GENERAL PRINCIPLES OF FINALITY AND REPOSE": FROM LORD BACON TO *RUF0*

The data described in Part IV indicate that the Court does not actually apply principles of *res judicata* consistently and uniformly. Moreover, as the case studies in Part III suggest, this may be a good thing: the Court often has good reasons for revisiting its judgments. In search of a superior standard for modifying prior decrees, I trace the history of finality principles and explain

159. The number of decree modifications would have been even more striking if the denominator were the number of cases with decree modification *requests*, rather than all cases with decrees. This way of counting would be impractical, however, because obtaining records for anything other than merits opinions is quite difficult with some of the older cases. Furthermore, using modification requests as the denominator might be somewhat misleading because parties could self-censor, choosing not to request modification if requests in similar cases were routinely denied. Regardless, even with the larger denominator that I used, the result is inconsistent with the absolute doctrine of *res judicata*.

160. *Wyandotte Chems. Corp.*, 401 U.S. at 498-99.

what “general principles of finality and repose” should mean in the context of original jurisdiction cases.¹⁶¹

A. Finality of Judgments: The Flexibility of Equity

For centuries, courts have tried to develop standards for when they will reconsider their judgments.¹⁶² The ancient division between law and equity permeates this history. Although law and equity have been nominally merged, the history of modifications in equity courts provides helpful guidance for choosing a principle for decree modification in the original jurisdiction.

Traditionally, at law, English and American judges retained power to modify their judgments until the expiration of the term at which the judgment was entered;¹⁶³ thereafter, parties could seek modification only under limited circumstances through a petition for a writ of error *coram nobis*.¹⁶⁴ In equity, judges similarly retained power to modify a decree until it was “enrolled”; thereafter, a petitioner would need to request a bill of review.¹⁶⁵

161. *Arizona v. California*, 460 U.S. 605, 619 (1983).

162. For instance, ancient rabbinical principles provide that “[if a party] produced new testimony, which could have been obtained before, the judgment could not be reversed. But if he brought witnesses who were in a distant land . . . or testimony of which he might have had no previous knowledge, a new trial was usually granted.” 7 THE JEWISH ENCYCLOPEDIA 385 (1904) (citing Hoshen Mishpat 20:1).

163. James Wm. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 627 (1946) (“[T]he term of court was the critical factor in the district court’s power over its final judgments at law and in equity.”); see also *United States v. Mayer*, 235 U.S. 55, 68–70 (1914) (discussing this practice in strong, jurisdictional terms). But see FED. R. CIV. P. 6(c) & advisory committee’s note to Subdivision (c) (1937) (stating that expiration of a term of court does not affect the court’s power); Moore & Rogers, *supra*, at 629 (“Historically, the term rule can be adequately explained as a rule of repose [rather than as an issue of jurisdiction or power].”). Despite the abolition of the term limitation, there are analogous time limitations imposed by Federal Rule of Civil Procedure 60(b)(5). See FED. R. CIV. P. 60(b)(5).

164. The writ was called *coram nobis*, meaning “before us,” for King’s Bench cases and *coram vobis*, meaning “before you,” for Common Pleas cases. *Coram Nobis*, BLACK’S LAW DICTIONARY (10th ed. 2014). This writ is available “only under circumstances compelling such action to achieve justice.” *United States v. Morgan*, 346 U.S. 502, 511 (1954).

165. Note that bills of review and writs of error *coram nobis* were issued in the trial court; this was in contrast to writs of error, which were issued by appellate courts and directed at trial courts. See Note, *Finality of Equity Decrees in the Light of Subsequent Events*, 59 HARV. L. REV. 957, 957–58 (1946). I disregard the highly technical distinction between a bill of review and a “bill in the nature of a bill of review”—the latter may lie where the decree has not been “enrolled.” *Whiting v. Bank of U.S.*, 38 U.S. (13 Pet.) 6, 13 (1839). Similarly, I avoid discussion of the writ of *audita querela*, a close cousin of the bill of review. Finally, note that in appellate cases, the Supreme Court has adopted its own rule for reconsidering its

The difference between finality principles at law and in equity is illustrated in the Court's explanation of final judgments and congressional authority to change them. In *Plaut v. Spendthrift Farm, Inc.*,¹⁶⁶ the Court held that Congress may not reverse the judiciary's final disposition of a case because Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them."¹⁶⁷ A significant corollary to this rule, first articulated in *Wheeling & Belmont Bridge*, is that Congress *does* have the authority to change substantive law in a way that forces a court to modify a prospective decree.¹⁶⁸ In other words, although an injunction is "a final judgment for purposes of appeal, it is not the last word of the judicial department."¹⁶⁹ Rather, the issuing court may be called upon to construe or enforce the decree at some time in the future; because of this "continuing supervisory jurisdiction," modifications to the underlying law allow modifications of the decree itself.¹⁷⁰ Therefore, a judgment at law is immune from congressional challenge, but in equity, changes of law can justify decree modifications.

For more than a century, the distinction between law and equity persisted in federal common law.¹⁷¹ But in 1938, the Federal Rules of Civil Procedure nominally merged law and equity, subsuming the legal writ of error *coram*

appellate judgments: the Court will, on its own motion or the (brief) motion of a party, allow rehearing of any case if any Justice concurring in the judgment so desires and the term at which judgment was entered has not expired. After the term has expired, rehearing is never allowed; the decision has gone beyond the Court. See *Brown v. Aspden's Adm'rs*, 55 U.S. (14 How.) 25, 26-27 (1852).

166. 514 U.S. 211 (1995).

167. *Id.* at 218-19; see also *id.* at 219 ("[A] judicial Power is one to render dispositive judgments . . . By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle." (internal quotation marks and citations omitted)).

168. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 432 (1855).

169. *Miller v. French*, 530 U.S. 327, 347 (2000) (internal quotation marks and citations omitted). This idea that a court retains "continuing supervisory jurisdiction" casts doubt on the Court's contention in *Nebraska v. Wyoming* that a motion for modification of a decree should be treated like a motion for leave to file a bill of complaint. The analogy is unsound: a motion for leave to file a bill of complaint is a request for the Court to use its jurisdiction, and the Court has held that, for a number of reasons, it would be unwise for it to take every original jurisdiction case that comes before it. See *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498-99 (1971). But a motion for decree modification is a request in a pending case, a case over which the Court retains supervisory jurisdiction. If the case is truly no longer worth the Court's time, the proper disposition would be to vacate the decree, not to refuse to hear a request for modification.

170. *Miller*, 530 U.S. at 347 (internal quotation marks and citations omitted).

171. See, e.g., *Bronson v. Schulten*, 104 U.S. 410, 416-17 (1881) (contrasting federal procedure for modification with the new unified procedures of state courts in which law and equity had merged).

nobis and the equitable bill of review into a single “motion for relief from judgment.”¹⁷² Nevertheless, the merger did not rob history of its significance.¹⁷³ In the district courts, prospective decrees are still subject to modification if enforcement would be inequitable.¹⁷⁴

B. From Bacon to Horne: Development of the Flexible Test in Equity

Tracing the development of the standard for modifying judgments in cases at equity illuminates the rationale behind the flexible standard that trial courts have adopted and that the Supreme Court should also adopt for its original jurisdiction cases. When the old equity courts were presented with bills of review, they asked two questions:¹⁷⁵ first, whether reconsideration is justified at all; second, if so, whether the court will exercise its equitable discretion in modifying the decree. The first inquiry was more formulaic: a party had to fall into one of several prescribed categories to qualify for a bill of review.¹⁷⁶ The second involved the court’s traditional equitable discretion.¹⁷⁷ This Section

172. FED. R. CIV. P. 60(e) (“The following are abolished: bills of review, bills in the nature of bills of review, and writs of *coram nobis*, *coram vobis*, and *audita querela*.”). In criminal law, however, the ancient writ of error *coram nobis* is still available. See, e.g., *United States v. Morgan*, 346 U.S. 502, 506-07 (1954) (holding that even after he had served his entire sentence, a man convicted in federal court could file a motion in the nature of a writ of error *coram nobis* to set aside his prior conviction for the trial court’s failure to provide counsel).

173. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 234-35 (1995) (“Rule 60(b) does not provide a new remedy at all, but is simply the recitation of pre-existing judicial power.”); see also *Gonzalez v. Crosby*, 545 U.S. 524, 540 (2005) (Stevens, J., dissenting) (“Rule 60(b) reflects and confirms the courts’ own inherent and discretionary power, firmly established in English practice long before the foundation of our Republic, to set aside a judgment whose enforcement would work inequity.” (internal quotation marks omitted)).

174. See FED. R. CIV. P. 60(b)(5).

175. For a modern application, see *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992) (“Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district court should determine whether the proposed modification is suitably tailored to the changed circumstance.”).

176. See *infra* note 181 and accompanying text.

177. Justice Story explained this succinctly: “The new matter must be relevant and material, and such, as if known, might probably have produced a different determination. But it must be such as the party, by the use of reasonable diligence, could not have known, for laches or negligence destroys the title to relief.” *Southard v. Russell*, 57 U.S. (16 How.) 547, 551 (1853) (citing 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 326-27 (1846)); see also *Ricker v. Powell*, 100 U.S. 104, 107 (1879) (“[A modification pursuant to a bill of review] may be refused, although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause, unadvisable.” (quoting JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS 332 (2d ed. 1840))). As in other equitable discretion circumstances, the interests

concentrates on the first step in the analysis: the threshold showing that a party must make in order to convince the court to reconsider its prior weighing of the equities, which varies depending on the finality principle at issue.¹⁷⁸

As a foundational matter, a court always retains supervisory jurisdiction over a final decree;¹⁷⁹ the defendant remains bound to obey under penalty of contempt. Thus justice requires that the court retain jurisdiction to modify that decree if it becomes inequitable. This intuition dates back to Lord Bacon's ordinances in 1619.¹⁸⁰ Bacon, the Lord Chancellor at the time, considered the same question we consider today: when should the court exercise this jurisdiction to modify a decree? He propounded the following guidelines:

No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review: and no bill of review shall be admitted, except it contain either [(1)] error in law, appearing in the body of the decree without farther examination of matters in fact, or [(2)] some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made: nevertheless [(3)] upon new proof, that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise.¹⁸¹

Lord Bacon's tripartite test set forth broad categories that are still relevant to courts' decree modification inquiries today.

of the parties are not viewed in isolation. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944) (holding that where there exists a threshold ground for considering modification (step one), defendant's lack of diligence is not dispositive because public interests must also be weighed in the balance of the equities).

178. With respect to step two, the trial court has great discretion to balance "[t]he policy of the law to favor a hearing of a litigant's claim on the merits" against "the desire to achieve finality in litigation." 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2857 (3d ed. 2012). The court's inquiry is "equitable, often fact-intensive," and the court may consider a variety of factors in addition to those that are explicitly listed in Rule 60. *Gonzalez*, 545 U.S. at 540 (Stevens, J., dissenting). Such factors "include the diligence of the movant, the probable merit of the movant's underlying claims, the opposing party's reliance interests in the finality of the judgment, and other equitable considerations." *Id.* (citing *Plaut*, 514 U.S. at 233-34; 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2857 (2d ed. 1995 & Supp. 2004)).

179. See, e.g., *Miller v. French*, 530 U.S. 327, 347 (2000).

180. See Note, *supra* note 165, at 958 (describing some sixteenth-century precursors to the Ordinances).

181. *Id.* at 959 n.9 (quoting 7 FRANCIS BACON, *THE WORKS OF FRANCIS BACON* 759 (1879)).

The first ground, “error in law,” is generally left to appeals courts today, but this notion is still reflected in the common-law power of courts to correct their own clerical errors.¹⁸² Another progeny of this category is the idea that courts have inherent power to modify their own decrees to make their terms unambiguous.¹⁸³ The third ground for review – newly discovered evidence that was not available at trial – has remained a distinct category.¹⁸⁴

The second ground, “new matter,” is the most capacious and the most contentious. By the middle of the twentieth century, courts recognized two broad types of new matter that could ground an argument for decree modification: changes of law and changes of fact.¹⁸⁵

Changes of law may require courts to reconsider a decree.¹⁸⁶ For instance, in the *Wheeling & Belmont Bridge* case, the Supreme Court determined that the erection of a bridge was unlawful and decreed that the bridge must be destroyed.¹⁸⁷ Then Congress specifically blessed the bridge by statute.¹⁸⁸ The defendant asked the Court for release from its obligations under the decree, and the Court acquiesced.¹⁸⁹ This result is not surprising: it is aligned with our separation-of-powers understanding that the political branches should be able to repeal and update our laws without being hemmed in by ossified decrees. This outcome is less obvious when the decree was entered by consent, with no determination of liability. However, the Supreme Court has held that even in such cases, given that bargaining was accomplished in the shadow of the law, the removal of the statute casting that shadow requires reevaluation of the underlying decree.¹⁹⁰

182. See FED. R. CIV. P. 60(a).

183. *Uervo, Inc. v. Selking*, 28 N.E.2d 61, 63–64 (Ind. 1940).

184. FED. R. CIV. P. 60(b)(2). Also, two grounds not mentioned by Lord Bacon are explicitly listed in Rule 60(b) and might be considered subspecies of new evidence. FED. R. CIV. P. 60(b)(1), (3) (“mistake, inadvertence, surprise, or excusable neglect” and “fraud”); see, e.g., *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944) (“Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments.”).

185. See generally Note, *supra* note 165, at 960.

186. *Horne v. Flores*, 557 U.S. 433, 434 (2009) (“[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or . . . flow from such a violation.” (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977))).

187. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 578 (1851).

188. Act of Aug. 31, 1852, §§ 6–7, 10 Stat. 110, 112.

189. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 436 (1855).

190. In *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), for instance, parties entered a consent decree prohibiting discrimination against nonunion railway employees, which was against the law at the time. *Id.* at 643. When Congress modified the relevant statute to allow unions, the Court allowed the trial court to modify the decree. *Id.* at 652–53.

In addition to changes of law, “new matter” can also arise from changes of fact.¹⁹¹ Original jurisdiction examples abound—avulsion may have caused an interstate boundary to freeze in place;¹⁹² a new technology may have called into question a court’s earlier equitable apportionment of water.¹⁹³ When changes in fact happen after the entry of decrees, trial courts consider these changes as possible justifications for reweighing the equities.¹⁹⁴

In the early twentieth century, the Supreme Court’s appellate case law sharply curtailed this approach with what has become known as the “grievous wrong” test. The test was crafted by Justice Cardozo in the 1932 case *United States v. Swift & Co.*, and it set a very high bar: “Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.”¹⁹⁵ Scholars and lower courts gradually pushed back against *Swift*’s stringent requirements.¹⁹⁶ In *New York State Association for Retarded Children, Inc. v. Carey*,¹⁹⁷ the Second Circuit was confronted with the challenge of applying *Swift* to an institutional reform case. Judge Friendly found that

191. “It now appears well established that an issuing court may, upon proper showing of change in circumstances, modify or vacate an existing ‘permanent’ injunction” Note, *supra* note 165, at 960.

192. *Louisiana v. Mississippi*, 516 U.S. 22 (1995).

193. *Nebraska v. Wyoming*, 515 U.S. 1 (1995).

194. See, e.g., *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942) (in affirming the modification of a decree, asking “whether the change served to effectuate or to thwart the basic purpose of the original consent decree”); *Am. Press Ass’n v. United States*, 245 F. 91, 94 (7th Cir. 1917) (directing trial court to enter a supplemental decree to modify an earlier antitrust decree in light of changed factual circumstances in the newspaper industry). Of course, while changes in circumstances were just as common in years past, *long-term decrees* were not. Therefore the issue is more salient today.

195. 286 U.S. 106, 119 (1932) (Cardozo, J.).

196. See, e.g., *SEC v. Warren*, 583 F.2d 115, 119 (3d Cir. 1978) (“The Court’s considerations in rejecting modification of the injunction [in *Swift*] must be viewed in the context of the unusual conditions before it, the public interest, and the perceived continuing danger to the nation’s economy.”); *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31, 34-35 (2d Cir. 1969); Jost, *supra* note 79, at 1132-52 (outlining the various reasons for modifying a decree); Marc I. Steinberg, *SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification, and Dissolution*, 66 CORNELL L. REV. 27, 71 (1980) (criticizing the *Swift* test and instead proposing an *ad hoc* balancing test that considers a variety of factors). Even the Supreme Court itself demonstrated greater flexibility than *Swift* would suggest. See, e.g., *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (“The District Court misconceived the thrust of this Court’s decision in *Swift*.”); *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 298 (1941) (“Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted.”).

197. 706 F.2d 956 (2d Cir. 1983).

because of their complexity and longevity, institutional reform decrees would be particularly unmanageable under the “grievous wrong” test. He explained, “The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible.”¹⁹⁸

The Supreme Court was eventually convinced by Judge Friendly’s arguments. In *Rufo v. Inmates of Suffolk County Jail*, the Court described a flexible test for district courts to apply when considering requests for modifications of their decrees.¹⁹⁹ The Court noted that “the ‘grievous wrong’ language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees.”²⁰⁰ Emphasizing “the need for flexibility in administering consent decrees,”²⁰¹ the Court noted that “a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.”²⁰² The Court added that in the time since the Court adopted the “grievous wrong” test, the Federal Rules of Civil Procedure had been adopted, and Rule 60’s standard is liberal.²⁰³

Rufo lists situations in which a change of facts could justify a decree modification: (1) “changes in circumstances that were beyond the defendants’ control and were not contemplated by the court or the parties when the decree was entered”;²⁰⁴ (2) “achieving the goals” of the underlying litigation;²⁰⁵ and (3) advancing the public interest when decrees affect parties not directly involved in the suit and the public’s right to sound operations of institutions.²⁰⁶ Though dressed up in new verbiage and re-christened as the “flexible approach,”²⁰⁷ the test articulated in *Rufo* instantiates the second category of “new matter” in Lord Bacon’s traditional test.

However, *Rufo* was not the Supreme Court’s last word on the matter. The Supreme Court revisited the issue of decree modifications in *Frew v.*

198. *Id.* at 967.

199. 502 U.S. 367 (1992).

200. *Id.* at 380.

201. *Id.*

202. *Id.* (quoting *Ry. Emps. v. Wright*, 364 U.S. 642, 647 (1961)).

203. *Id.* (“That Rule, in providing that, on such terms as are just, a party may be relieved from a final judgment or decree where it is no longer equitable that the judgment have prospective application, permits a less stringent, more flexible standard.”).

204. *Id.* at 381.

205. *Id.*

206. *Id.* (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)).

207. *See, e.g., Horne v. Flores*, 557 U.S. 433, 450 (2009).

*Hawkins*²⁰⁸ and again in *Horne v. Flores*.²⁰⁹ The reasoning in these cases addressed decrees in the specific context of institutional reform litigation against state agencies. In *Horne*, this focus on institutional reform litigation is underscored by the Court's three reasons for applying a *particularly* flexible test in such cases.²¹⁰

The first of these concerns is the frequency with which changed circumstances occur in institutional reform cases.²¹¹ Of course, changed circumstances can arise in any case involving a permanent injunction, including in the original jurisdiction. But the flexible test of *Rufo* sufficiently addresses changes of fact and changes of law. The difference in *Horne* is that the Court added a third type of change that might justify modification: "new policy insights."²¹² This subtle shift evinces the Court's true concerns, which it also listed explicitly as the second and third rationales for applying a particularly flexible test to institutional reform cases: these decrees shift power from state legislatures to a single federal judge, raising federalism concerns.²¹³ Furthermore, they ossify policy, allowing state actors to bind their successors by failing to defend these suits vigorously.²¹⁴

The *Horne* Court's concerns are not as salient in original jurisdiction cases. Commentators have provided many examples of state actors seeking to bind their successors by acting as "secret plaintiffs" in institutional reform cases.²¹⁵ By contrast, original jurisdiction disputes are truly adversarial. State officials do not have political incentives to concede to the opposing state more land or more water than it deserves. Federalism concerns are similarly lacking in original jurisdiction decrees. The original jurisdiction of the Supreme Court is unabashedly federalist. The *point* of the original jurisdiction, ambassadors aside, is to provide a federal forum for interstate disputes.

Given that worries about collusive state actors and federalism concerns are not present in the original jurisdiction, the rationale of *Horne* does not apply to original jurisdiction cases. Rather, the best reading of *Horne* is that it changed

208. 540 U.S. 431, 441-42 (2004).

209. 557 U.S. at 447-48.

210. *Id.*

211. *Id.* at 447-49.

212. *Id.* at 448.

213. *See id.*

214. *See id.* at 448-49.

215. *See, e.g.,* Gerald N. Rosenberg, *The Politics of Consent: Party Incentives in Institutional Reform Consent Decrees*, in *CONSENT AND ITS DISCONTENTS: POLICY ISSUES IN CONSENT DECREES* 13, 29 (Andrew Rachlin ed., 2006) (describing reports of state officials colluding with plaintiffs to bring institutional reform lawsuits against their agencies).

the test for institutional reform decrees specifically; the better test for decree modifications in original jurisdiction cases is the one articulated in *Rufo*.²¹⁶

C. The Finality Rule and Its Application in Original Jurisdiction Cases

A synthesis of this case law demonstrates that when deciding whether to modify a decree, a federal court considers essentially the same factors that Lord Bacon announced in 1619.²¹⁷ The Court should consider adopting this approach, both to increase doctrinal coherence and to more accurately describe how the Court determines whether to modify its decrees.

Under this traditional approach, which elaborates Lord Bacon's standard, a court asks the following questions:²¹⁸ First, is there a clerical error on the face of the decree, or an ambiguity that renders the decree unenforceable as written? Second, has newly discovered evidence arisen that could not have reasonably been discovered in time to move for a new trial?²¹⁹ Finally, has a "new matter" arisen since trial that makes continued prospective enforcement of the decree inequitable?

This last question, in turn, is further elaborated under *Rufo*. To answer the third question, a court would first inquire whether the underlying law has changed or, more commonly in original jurisdiction cases, whether there has been a change in facts that unexpectedly makes compliance (1) substantially more onerous to litigants; (2) detrimental to the public interest; or (3) less effective in vindicating a protected party's rights.²²⁰ If any of these prongs is satisfied, or if the parties consent, then the court would reweigh the equities to determine if a modification is justified.²²¹

The Court should explicitly adopt this test for four reasons. First, this test more accurately articulates the finality principle that the Supreme Court should and does apply in the original jurisdiction docket. Second, this test can account

216. Though not especially relevant to the original jurisdiction, the rule specific to institutional reform litigation is, of course, extremely important in its own right. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (discussing the increasing prevalence of institutional reform litigation).

217. See *supra* notes 180-181 and accompanying text.

218. Though I believe this list is relatively complete, in theory it is non-exhaustive. There is a catchall provision in the Federal Rules of Civil Procedure allowing a court to grant a modification for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6).

219. I would include in this category evidence of "fraud" and of "mistake, inadvertence, surprise, or excusable neglect." See FED. R. CIV. P. 60(b)(1), (3).

220. In non-original jurisdiction cases, the court might also ask a fourth question: whether federalism concerns require devolution of power under the decree back to state officials.

221. See *supra* note 178 and accompanying text.

for the difference in decree modification rates in different types of cases, as observed in Part IV. Third, it is not a mechanical test, as equity is not a mechanical doctrine.²²² This test provides content to the “general principles of finality and repose” mentioned in *Arizona v. California*; it is far more specific than “principles of res judicata”;²²³ and it has centuries of history backing it. Finally, unlike res judicata, this test properly balances competing interests in finality and justice.

A few examples illustrate the test’s effectiveness.

1. *Water Rights*

Recall *Wisconsin v. Illinois*,²²⁴ the Chicago sewage case. The accrual of a large amount of active sludge was a textbook case of “new matter.” If the Court had applied the *Rufo* test, it would have found that there was a change in facts that unexpectedly made compliance substantially more onerous to the defendant, justifying a reweighing of equities. The second decree modification, due to an anomalous drop in the Mississippi River, would have also been justified under the *Rufo* test: it is a perfect example of unanticipated changed circumstances in which unmodified enforcement of the decree would have been detrimental to the public interest.

Similarly, in *Nebraska v. Wyoming*, the case involving a new irrigation technology, the Court agreed to reweigh the equities, but did not actually reach that second step before the parties settled.²²⁵ The Court’s justification for allowing argument on the reweighing of equities was that there had been a change of facts – the development of this new irrigation technology – that made prospective application of the decree inequitable by making the decree less effective at vindicating the plaintiff’s rights. This justification is also consistent with the *Rufo* articulation of Lord Bacon’s standard.

222. *Cf. Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 609 (7th Cir. 1986) (Swygert, J., dissenting) (arguing that “[a] quantitative approach may be an appropriate and useful heuristic device in determining negligence in tort cases . . . [because] [t]he judgment of the district judge in a tort case must be definite; [however,] the judgment of the district judge in an injunction proceeding cannot, by its very nature, be as definite”).

223. *Arizona v. California*, 460 U.S. 605, 626 (1983).

224. 311 U.S. 107 (1940); see *supra* Section II.B.

225. 132 S. Ct. 1072 (2012) (mem.).

2. *Boundary Disputes*

In *Louisiana v. Mississippi*, the Supreme Court entered a decree in 1906 establishing the contested boundary between the two states, including on the Mississippi River.²²⁶ Between 1912 and 1913, the river avulsed. This rapid change in land mass around the river froze the interstate boundary as a matter of law, meaning that the boundary no longer moved with the navigable channel of the Mississippi River. The parties returned to the Court, as the old decree was no longer specific enough to describe the boundary around the area of the avulsion. In other words, under the *Rufo* test, a change in facts decreased the old decree's efficacy in vindicating the litigants' rights. Therefore reconsidering the prior decree was justified.

In *Kansas v. Missouri*, the Court was forced to modify a decree because of a change in law.²²⁷ After the full resolution of the case on the merits and the entry of a decree, the litigants reached a compromise that was blessed by Congress pursuant to the Compacts Clause.²²⁸ In accordance with *Wheeling & Belmont Bridge*, this meant that the old decree could no longer be prospectively enforced. It satisfies the "change of law" branch of the "new matter" prong, so under the above test, the Court should have modified the decree to conform to the interstate compact. This is exactly what the Court did.

Notwithstanding these examples, it is worth noting that these cases—wherein "new matter" warrants a decree modification—are rare among boundary-dispute cases. Intuitively, and especially compared to water rights cases, unforeseeable changes in circumstances that would affect state borders are limited. This explains the low modification rate for boundary-dispute cases noted in Part IV.

3. *Federal-State Title Disputes*

*United States v. California*²²⁹ involved a dispute regarding title to the lands underlying certain bays and estuaries extending out into the Pacific Ocean. The Supreme Court articulated a standard and entered a broad decree regarding how the boundary should be drawn, reserving the issue of drawing that boundary with precision.²³⁰ As oil drilling made the boundary question particularly pressing in some areas, the parties returned to the Court, asking

²²⁶ 516 U.S. 22, 27 (1995).

²²⁷ 340 U.S. 859, 859 (1950).

²²⁸ *Id.*

²²⁹ 381 U.S. 139 (1965).

²³⁰ *Id.* at 142.

for precise lines in those regions.²³¹ However, Congress then entered the fray, passing the Submerged Lands Act, “vest[ing] in California all the interests that were then thought to be important.”²³² The case fell silent.

When drilling technology again improved, so that submerged lands even further off the coast could be drilled, the dispute revived. The Court modified its decree to provide more specificity, but also to incorporate legislative changes—both the Submerged Lands Act itself and, with respect to certain technical issues, changes in the international law on what constituted inland waters.²³³ The question of whether to grant a modification in this case was another example of applying the *Rufo* articulation of Lord Bacon’s inquiry—specifically, there had been a change in the underlying substantive law on which the old decree rested.

4. Other Cases

The *Rufo* standard works also for the wide variety of miscellaneous original jurisdiction cases the Court handles apart from boundaries, water rights, and title disputes. For example, in *New Jersey v. City of New York*, an interstate nuisance case, New Jersey sued New York City for dumping garbage into the Atlantic, causing it to end up on the shores of New Jersey.²³⁴ New York City’s defense was that it had *always* dumped garbage into the Atlantic.²³⁵ New Jersey prevailed: the Court ordered that New York City construct incinerators for its garbage and cease dumping garbage by a date certain, or else pay a daily fine to New Jersey.²³⁶ New York City, due to financial constraints, did not meet the deadline.²³⁷ The Court awarded damages to New Jersey but modified its decree to set a new date for compliance.²³⁸

This application for a decree modification, though not discussed using any particular standard, could also have been examined through the *Rufo* articulation of the “new matter” inquiry. Specifically, the Court could have asked whether there had been a change in facts that unexpectedly made compliance substantially more onerous on the defendant. It is not clear whether that is what was actually *done* in this case—it occurred during the

²³¹ *Id.*

²³² *Id.* at 148.

²³³ *Id.* at 161–67.

²³⁴ 283 U.S. 473, 476 (1931).

²³⁵ *Id.* at 477.

²³⁶ *Id.* at 483.

²³⁷ 290 U.S. 237, 238 (1933).

²³⁸ *Id.* at 240.

Great Depression, so perhaps there truly was an unexpected change in New York City's finances. If not, perhaps the modification should not have been granted. Instead, the Court might have found that New York City was violating the decree, albeit not contemptuously, and ordered it to comply by a new date certain or be held in contempt of court. Regardless of what the Court may have done, the inquiry could have been conducted under a relatively transparent, replicable test. Instead, the Court's standard for modification was unspoken and its rationale opaque.

CONCLUSION

The Court's current standard for modifying decrees in original jurisdiction cases, insofar as it has one, confuses litigants more than it guides them and does not reflect the Court's practice. "Principles of *res judicata*" are not applied in any other context, and *res judicata* is not a reasonable doctrine to apply to motions for decree modification. Because of the longevity and the shifting equities in many original jurisdiction cases, a more balanced and nuanced test is required.

Instead of reinventing the wheel, the Supreme Court should decide whether to modify its decrees under the same two-step inquiry that has guided courts of equity since the seventeenth century. This standard would properly channel the Court's discretion, without being excessively restrictive (like principles of *res judicata*) or excessively directionless (like law of the case). By explicitly adopting such a test, the Court would bring clarity to its decision-making process and guide litigants as they navigate the rarely travelled path of the original jurisdiction of the Supreme Court.

APPENDIX A: OUTCOMES OF ALL ORIGINAL JURISDICTION CASES
BY CATEGORY

| Category | Denied | Dismissed (Including Withdrawn) | Unknown, or Long Inactive | Ongoing | Temporary Relief Only | Merits (No Decree) ²³⁹ | Decree: Never Modified | Decree: Modified | Total |
|--|--------|---------------------------------------|------------------------------|---------|--------------------------|--------------------------------------|---------------------------|---------------------|-------|
| Boundaries | 1 | 3 | 4 | 0 | 0 | 7 | 38 | 4 | 57 |
| Federalism ²⁴⁰ | 19 | 5 | 1 | 0 | 0 | 8 | 0 | 0 | 33 |
| Water Rights ²⁴¹ | 2 | 5 | 0 | 5 | 0 | 5 | 3 | 12 | 32 |
| Federal-State Title Disputes | 0 | 5 | 0 | 0 | 0 | 4 | 8 | 8 | 25 |
| Taxes | 10 | 1 | 0 | 0 | 1 | 2 | 2 | 0 | 16 |
| Purported Original Jurisdiction Cases ²⁴² | 12 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 15 |
| Constitutionality of State Laws ²⁴³ | 8 | 1 | 0 | 1 | 1 | 1 | 1 | 0 | 13 |
| Nuisance | 3 | 3 | 0 | 0 | 0 | 2 | 0 | 2 | 10 |

²³⁹. Determining how the Court disposed of a case can be challenging. For instance, in *Minnesota v. Hitchcock*, 185 U.S. 373, 402 (1902), the Court disposed of the case as follows: “For these reasons we are of opinion that the claim of Minnesota to these lands cannot be sustained, and a decree will be entered in favor of the defendants dismissing the bill.” Despite the use of the words “decree” and “dismissing,” I classified the case as a “merits” determination because the Court considered the merits of the plaintiff’s claim and ruled against it. In general, my guiding principle was that either a denial or a dismissal was nevertheless a “merits” determination if the Court considered the merits of the plaintiff’s claim before entering judgment. *See, e.g., Iowa v. Slimmer*, 248 U.S. 115 (1918) (although the Court denied leave to file, I classified the case as “merits”); *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395 (1870) (although the case was dismissed, I classified it as “merits”). I also classified as “merits” a case that entered a money judgment at law.

²⁴⁰. “Federalism” cases involve questions of federal-state balance, mainly state objections to the constitutionality of federal statutes, regulations, or actions.

²⁴¹. The “Water Rights” category includes cases seeking injunctions to prevent water diversions; cases involving compacts for the division of water rights; and equitable apportionment cases.

²⁴². “Purported Original Jurisdiction Cases” were unsuccessful attempts to invoke the Court’s original jurisdiction in novel ways.

²⁴³. “Constitutionality of State Laws” cases involve state challenges to the constitutionality of other states’ laws, such as dormant commerce clause cases.

| <i>Category</i> | <i>Denied</i> | <i>Dismissed (Including Withdrawn)</i> | <i>Unknown, or Long Inactive</i> | <i>Ongoing</i> | <i>Temporary Relief Only</i> | <i>Merits (No Decree)²³⁹</i> | <i>Decree: Never Modified</i> | <i>Decree: Modified</i> | <i>Total</i> |
|---|---------------|--|--------------------------------------|----------------|----------------------------------|---|-----------------------------------|-----------------------------|--------------|
| Corporate Activities (Liquidations, Mergers, etc.) | 3 | 5 | 0 | 0 | 0 | 1 | 0 | 0 | 9 |
| Riparian Rights & Obstruction of Waterways | 2 | 0 | 0 | 0 | 0 | 3 | 2 | 1 | 8 |
| Miscellaneous (Replevin, Tort, Procedure, etc.) | 4 | 1 | 0 | 0 | 0 | 2 | 1 | 0 | 8 |
| Unknown Controversy | 2 | 2 | 3 | 0 | 0 | 0 | 0 | 0 | 7 |
| Contracts | 4 | 1 | 0 | 1 | 0 | 0 | 1 | 0 | 7 |
| Bonds | 0 | 1 | 0 | 0 | 0 | 3 | 0 | 1 | 5 |
| State-Citizen Title Disputes ²⁴⁴ | 0 | 3 | 0 | 0 | 0 | 2 | 0 | 0 | 5 |
| Escheat of Unclaimed Property | 0 | 0 | 1 | 0 | 0 | 1 | 2 | 0 | 4 |
| Criminal Law (Extradition, Death Penalty) | 3 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 4 |
| State-Citizen Debt Disputes ²⁴⁵ | 0 | 0 | 1 | 0 | 0 | 1 | 1 | 0 | 3 |
| Ambassador, Public Minister, & Consul Cases | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 2 |
| Total | 73 | 39 | 10 | 7 | 2 | 45 | 59 | 28 | 263 |

244. Note that "State-Citizen Title Dispute" cases are obsolete (1895-1924).

245. Note that "State-Citizen Debt Dispute" cases are obsolete (1792, 1872, 1875).

**APPENDIX B: ACTIVITY IN ORIGINAL JURISDICTION CASES FROM
APRIL 25, 1993 THROUGH DECEMBER 31, 2015**

New Cases

Nebraska v. Colorado, No. 144, Orig.

Suit to enjoin an article in the Colorado Constitution legalizing marijuana as unconstitutional under the Supremacy Clause.

- 135 S. Ct. 2070 (2015) (call for the views of the Solicitor General on behalf of the United States (CVSG))

Mississippi v. Tennessee, No. 143, Orig.

Suit to enjoin allegedly intentional pumping of intrastate groundwater from within Mississippi sandstone, and for damages.

- 135 S. Ct. 425 (2014) (CVSG)
- 135 S. Ct. 2916 (2015) (motion for leave to file a bill of complaint granted)
- 136 S. Ct. 499 (2015) (special master appointed)

Florida v. Georgia, No. 142, Orig.

Suit for equitable apportionment of Apalachicola-Chattahoochee-Flint River Basin and associated injunction to sustain adequate flow.

- 134 S. Ct. 1509 (2014) (CVSG)
- 135 S. Ct. 471 (2014) (motion for leave to file bill of complaint granted)
- 135 S. Ct. 701 (2014) (special master appointed)
- 135 S. Ct. 2342 (2015) (master's fee assessed)
- 136 S. Ct. 353 (2015) (master's fee assessed)

Texas v. New Mexico, No. 141, Orig.

Suit to enjoin diversion of surface water and pumping of groundwater allegedly in violation of the Rio Grande Compact.

- 133 S. Ct. 1855 (2013) (CVSG)
- 134 S. Ct. 1050 (2014) (motion for leave to file bill of complaint granted; motion for leave to file supplemental brief granted; defendant invited to file motion to dismiss)
- 134 S. Ct. 1783 (2014) (United States' motion for leave to intervene granted)
- 135 S. Ct. 474 (2014) (special master appointed)
- 135 S. Ct. 1914 (2015) (motion for leave to intervene referred to master)

- 136 S. Ct. 289 (2015) (motion for leave to intervene referred to master; master's fee assessed)

Louisiana v. Bryson, No. 140, Orig.

Suit to enjoin counting of non-immigrant foreign nationals in U.S. Census, for purpose of allocating seats in the House of Representatives.

- 132 S. Ct. 1781 (2012) (motion for leave to file bill of complaint denied)

Mississippi v. City of Memphis, No. 139, Orig.

*Suit to enjoin Memphis from withdrawing water from an interstate aquifer, and for equitable apportionment of the water therein.*²⁴⁶

- 559 U.S. 901 (2010) (motion for leave to file bill of complaint denied without prejudice²⁴⁷)

South Carolina v. North Carolina, No. 138, Orig.

Suit for equitable apportionment of interstate stream.

- 552 U.S. 804 (2007) (motion for leave to file bill of complaint granted; application for preliminary injunction, having been presented to the Chief Justice and referred to the Court, denied)
- 552 U.S. 1160 (2008) (special master appointed; motions for leave to intervene referred to master)
- 552 U.S. 1254 (2008) (motion for leave to intervene referred to master)
- 129 S. Ct. 895 (2009) (master's report received; motion for leave to file exceptions granted)
- 556 U.S. 1151 (2009) (exceptions to master's report set for oral argument)
- 556 U.S. 1178 (2009) (Solicitor General's motion for leave to participate in oral argument as amicus curiae and for divided argument granted; argument times specified)
- 558 U.S. 256 (2010) (decision on merits authored by Alito, J.) (Roberts, C.J., concurring in part and dissenting in part)
- 131 S. Ct. 975 (2011) (special master discharged)

246. Niki L. Pace, *U.S. Supreme Court Rejects Mississippi Water Suit Against Memphis*, WATER LOG, Feb. 2010, at 4, <http://masglp.olemiss.edu/Water%2oLog/WL29/29.4memphis.htm> [<https://perma.cc/FF84-L7N9>].

247. The order's citations suggest that Mississippi had not demonstrated "real or substantial injury."

Montana v. Wyoming, No. 137, Orig.

Suit for damages alleging that Wyoming breached the Yellowstone River Compact by changing irrigation method.

- 550 U.S. 932 (2007) (CVSG)
- 552 U.S. 1175 (2008) (motion for leave to file bill of complaint granted; Wyoming invited to file motion to dismiss)
- 129 S. Ct. 480 (2008) (special master appointed; motion to dismiss referred to master; motion for leave to file brief as amicus curiae referred to special master)
- 558 U.S. 809 (2009) (master's fee assessed)
- 559 U.S. 989 (2010) (master's report received)
- 131 S. Ct. 497 (2010) (one exception to master's report set for oral argument, one recommitted to master; motion to dismiss denied; master's fee assessed) (Kagan, J., not participating)
- 131 S. Ct. 442 (2010) (motion for partial summary judgment granted in part and denied in part without prejudice in accordance with master's report; motion for leave to intervene denied) (Kagan, J., not participating)
- 131 S. Ct. 551 (2010) (motion of Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument granted) (Kagan, J., not participating)
- 131 S. Ct. 1765 (2011) (decision on merits authored by Thomas, J.) (Kagan, J., not participating) (Scalia, J., dissenting)
- 134 S. Ct. 500 (2013) (master's fee assessed)
- 135 S. Ct. 1479 (2015) (master's report received; parties "directed to consider carefully whether it is appropriate for them to continue invoking the jurisdiction of this Court"; master's fee assessed)
- 136 S. Ct. 289 (2015) (motion to defer consideration granted; parties ordered to submit a joint status report to the Court)

Brzak v. United Nations, No. 136, Orig.

*United Nations High Commission for Refugees employees sued their superiors and the United Nations itself for Title VII violations, RICO violations, state law tort claims.*²⁴⁸

- 549 U.S. 806 (2006) (motion for leave to file bill of complaint denied)

²⁴⁸. See *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. 2010) (deciding on the merits of the case after it was filed with the district court in New York).

Texas v. Leavitt, No. 135, Orig.

*Suit by several states to enjoin enforcement of new prescription drug component of Medicare, particularly the requirement that states repay federal government for certain cost savings.*²⁴⁹

- 547 U.S. 1204 (2006) (motion for preliminary injunction denied; motion for leave to file bill of complaint denied)

New Jersey v. Delaware, No. 134, Orig.

Suit to establish riparian rights on the New Jersey side of Delaware River based on a compact.

- 546 U.S. 1147 (2006) (special master appointed)
- 549 U.S. 950 (2006) (master's fee assessed)
- 550 U.S. 932 (2007) (master's report received)
- 551 U.S. 1143 (2007) (master's fee assessed)
- 552 U.S. 972 (2007) (exceptions to master's report set for oral argument) (Breyer, J., not participating)
- 552 U.S. 597 (2008) (decision on merits authored by Ginsburg, J.) (decree entered; jurisdiction retained) (Breyer, J., not participating) (Stevens, J., concurring in part and dissenting in part) (Scalia, J., dissenting)
- 552 U.S. 1307 (2008) (special master discharged)

Arkansas v. Oklahoma, No. 133, Orig.

Substance of controversy unknown.

- 546 U.S. 1166 (2006) (motion for leave to file bill of complaint denied)

Alabama v. North Carolina, No. 132, Orig.

Same controversy as No. 131, Orig.

- 537 U.S. 806 (2002) (CVSG)
- 539 U.S. 925 (2003) (motion for leave to file bill of complaint granted)
- 540 U.S. 1014 (2003) (special master appointed)
- 549 U.S. 1202 (2007) (master's fee assessed)
- 556 U.S. 1206 (2009) (master's reports received)
- 558 U.S. 944 (2009) (exceptions to master's report set for oral argument)

²⁴⁹ Associated Press, *States Lose Supreme Court Appeal over Drug Plan*, USA TODAY (June 6, 2006), http://usatoday30.usatoday.com/news/washington/judicial/2006-06-19-medicare-court_x.htm [<https://perma.cc/2UDY-VVQY>].

- 560 U.S. 330 (2010) (partial motions to dismiss and for summary judgment granted in decision authored by Scalia, J.) (Kennedy, J., concurring in part and concurring in the judgment) (Roberts, C.J., concurring in part and dissenting in part) (Breyer, J., concurring in part and dissenting in part)
- 562 U.S. 820 (2010) (master's fee assessed) (Kagan, J., not participating)
- 131 S. Ct. 1035 (2011) (master's fee assessed) (Kagan, J., not participating)
- 131 S. Ct. 1061 (2011) (special master discharged)

Southeast Interstate Low-Level Radioactive Waste Management Commission v. North Carolina, No. 131, Orig.

*Suit for breach of contract and unjust enrichment under an interstate compact based on North Carolina's failure to continue efforts to obtain license for low-level radioactive waste disposal facility.*²⁵⁰

- 531 U.S. 942 (2000) (CVSG)
- 533 U.S. 926 (2001) (motion for leave to file bill of complaint denied)

New Hampshire v. Maine, No. 130, Orig.

*Suit to establish boundary underlying Piscataqua River.*²⁵¹

- 530 U.S. 1272 (2000) (motion for leave to file bill of complaint granted; defendant invited to file motion to dismiss on res judicata grounds; CVSG) (Souter, J., not participating)
- 531 U.S. 1066 (2001) (motion to dismiss set for oral argument) (Souter, J., not participating)
- 532 U.S. 742 (2001) (motion to dismiss granted in decision authored by Ginsburg, J.) (Souter, J., not participating)
- 532 U.S. 917 (2001) (motion for leave to participate in oral argument granted) (Souter, J., not participating)
- 533 U.S. 968 (2001) (petition for rehearing denied) (Souter, J., not participating)

²⁵⁰. See also *Alabama v. North Carolina*, 560 U.S. 330, 338 (2010) (suggesting that No. 131 was not within the Court's exclusive original jurisdiction because it was not "between two or more states").

²⁵¹. See also *New Hampshire v. Maine*, 434 U.S. 1 (1977) (No. 64, Orig.), which led to the resolution of this case on judicial estoppel grounds.

Virginia v. Maryland, No. 129, Orig.

Suit to establish riparian rights on Potomac River based on a 1785 compact and to enjoin Maryland from requiring permit for Virginia to build wharves and other structures.

- 530 U.S. 1201 (2000) (motion for leave to file brief as amicus curiae granted; motion for leave to file bill of complaint granted)
- 531 U.S. 922 (2000) (special master appointed)
- 531 U.S. 1140 (2001) (motion for review of master's finding of subject-matter jurisdiction denied; motion for costs denied without prejudice to refiling before master)
- 532 U.S. 969 (2001) (motion for leave to file amendment to answer and counterclaim granted; amendment referred to master)
- 534 U.S. 807 (2001) (master's fee assessed)
- 536 U.S. 903 (2002) (master's fee assessed)
- 537 U.S. 1102 (2003) (master's report received)
- 537 U.S. 1185 (2003) (master's fee assessed)
- 538 U.S. 997 (2003) (motion for leave to file brief as amicus curiae granted; exception to master's report set for oral argument)
- 540 U.S. 56 (2003) (decision on merits authored by Rehnquist, C.J.) (decree entered; jurisdiction retained) (Stevens, J., dissenting) (Kennedy, J., dissenting)
- 540 U.S. 805 (2003) (motion of plaintiff for judicial notice denied)
- 540 U.S. 1101 (2004) (special master discharged)

Alaska v. United States, No. 128, Orig.

Suit to establish title to intrastate submerged lands.

- 530 U.S. 1228 (2000) (motion for leave to file bill of complaint granted)
- 531 U.S. 941 (2000) (special master appointed)
- 531 U.S. 1066 (2001) (motion for leave to file amended complaint granted)
- 532 U.S. 902 (2001) (amended complaint and answer referred to special master)
- 532 U.S. 1006 (2001) (motion for leave to intervene referred to special master)
- 532 U.S. 1017 (2001) (master's fee assessed)
- 534 U.S. 1017 (2001) (master's fee assessed)
- 534 U.S. 1103 (2002) (master's report received; motion for leave to intervene denied)
- 535 U.S. 1052 (2002) (master's fee assessed)

- 537 U.S. 1026 (2002) (master's fee assessed)
- 538 U.S. 1055 (2003) (master's fee assessed)
- 540 U.S. 1043 (2003) (master's fee assessed)
- 541 U.S. 1008 (2004) (master's report received)
- 541 U.S. 1061 (2004) (master's fee assessed)
- 543 U.S. 953 (2004) (motion for leave to file sur-reply denied; exceptions to master's report set for oral argument)
- 545 U.S. 75 (2005) (decision on merits authored by Kennedy, J.) (Scalia, J., concurring in part and dissenting in part)
- 546 U.S. 413 (2006) (master's report filed; final decree entered; jurisdiction retained; master discharged) (Roberts, C.J., not participating)

Federal Republic of Germany v. United States, No. 127, Orig.

Action filed two hours before Arizona's scheduled execution of a German citizen seeking injunction to enforce an order of the International Court of Justice, which directed the United States to prevent execution.

- 526 U.S. 111 (1999) (opinion per curiam denying motion for preliminary injunction and motion for leave to file bill of complaint) (Souter, J., concurring) (Breyer, J., dissenting)

Kansas v. Nebraska, No. 126, Orig.

Suit claiming damages for overuse of water, pursuant to settlement agreement construing an earlier compact.

- 525 U.S. 805 (1998) (CVSG)
- 525 U.S. 1101 (1999) (motion for leave to file bill of complaint granted; motion to file sur-reply brief denied)
- 527 U.S. 1020 (1999) (motion to strike counterclaim denied; Nebraska invited to file motion to dismiss)
- 528 U.S. 1001 (1999) (special master appointed; motion to dismiss referred to master)
- 528 U.S. 1151 (2000) (master's report received)
- 530 U.S. 1272 (2000) (motion to dismiss denied)
- 531 U.S. 806 (2000) (motion for leave to file amended answer, counterclaim, and cross-claim referred to master; master's fee assessed)
- 532 U.S. 992 (2001) (master's fee assessed)
- 534 U.S. 1038 (2001) (master's fee assessed)
- 537 U.S. 806 (2002) (master's fee assessed)

- 538 U.S. 720 (2003) (master's report received; final settlement stipulation approved)
- 538 U.S. 1055 (2003) (master's fee assessed)
- 540 U.S. 964 (2003) (master's report received)
- 540 U.S. 1043 (2003) (master's fee assessed; special master discharged)
- 562 U.S. 820 (2010) (CVSG)
- 131 S. Ct. 1847 (2011) (motion for leave to file a petition granted; special master appointed)
- 132 S. Ct. 1618 (2012) (master's fee assessed)
- 133 S. Ct. 495 (2012) (master's fee assessed)
- 133 S. Ct. 1855 (2013) (master's fee assessed)
- 134 S. Ct. 2744 (2014) (exceptions to the master's report set for oral argument)
- 135 S. Ct. 44 (2014) (Solicitor General's motion for leave to participate in oral argument and for divided argument granted)
- 135 S. Ct. 1042 (2015) (decision on merits authored by Kagan, J.) (Roberts, C.J., concurring in part and dissenting in part) (Scalia, J., concurring in part and dissenting in part) (Thomas, J., concurring in part and dissenting in part)
- 135 S. Ct. 1255 (2015) (decree entered; jurisdiction retained)
- 135 S. Ct. 1582 (2015) (special master discharged)

Republic of Paraguay v. Gilmore, No. 125, Orig., *decided sub nom. Breard v. Greene*

Eleventh-hour suit to stay Virginia's execution of Paraguayan citizen and to enforce an International Court of Justice order.

- 523 U.S. 371 (1998) (opinion per curiam denying all motions, including motion for leave to file bill of complaint and motion for an original writ of habeas corpus) (separate statement by Souter, J.) (Stevens, J., dissenting) (Breyer, J., dissenting) (Ginsburg, J., dissenting)

Collins v. Alabama, No. 124, Orig.

Substance of controversy unknown.

- 519 U.S. 803 (1996) (motion to expedite consideration of motion to file bill of complaint denied; motion for leave to file bill of complaint denied)

Corrinet v. Ghali, No. 123, Orig.

Substance of controversy unknown.

- 516 U.S. 1039 (1996) (motion for leave to file bill of complaint denied)

Texas v. Louisiana, No. 122, Orig.

Substance of controversy unknown.

- 515 U.S. 1184 (1995) (motion to file bill of complaint dismissed pursuant to Supreme Court Rule of Procedure 46.1²⁵²)

Louisiana v. Mississippi, No. 121, Orig.

Suit to establish a boundary along Mississippi River.

- 513 U.S. 804 (1994) (motion to file supplemental answer granted)
- 513 U.S. 997 (1994) (master's report received)
- 514 U.S. 1002 (1995) (exceptions set for argument)
- 516 U.S. 22 (1995) (decision on merits authored by Kennedy, J.) (decree)

New Jersey v. New York, No. 120, Orig.

Suit to determine boundary at Ellis Island.

- 513 U.S. 924 (1994) (special master appointed)
- 514 U.S. 1013 (1995) (motion to intervene referred to special master)
- 514 U.S. 1125 (1995) (master's report received; motion to intervene denied)
- 515 U.S. 1130 (1995) (master's fee assessed)
- 519 U.S. 1038 (1996) (master's fee assessed)
- 520 U.S. 1273 (1997) (master's report received)
- 521 U.S. 1116 (1997) (master's fee assessed; motion to file exceptions in excess of page limits denied)
- 523 U.S. 767 (1998) (decision on merits authored by Souter, J.) (Breyer, J., concurring) (Stevens, J., dissenting) (Scalia, J., dissenting)
- 524 U.S. 968 (1998) (petition for rehearing denied)
- 526 U.S. 589 (1999) (decree entered)
- 527 U.S. 1002 (1999) (master's fee assessed)

²⁵². In other words, the motion for leave to file bill of complaint was dismissed by the Clerk on the joint motion of all parties.

*Additional Activity in Pre-1993 Cases*²⁵³**Delaware v. New York, No. 111, Orig.**

- 510 U.S. 1106 (1994) (plaintiff's motion to dismiss without prejudice referred to special master)
- 512 U.S. 1202 (1994) (Delaware's complaint dismissed; Delaware's motion to dismiss its own complaint without prejudice denied; New York's motion to file counterclaims denied without prejudice; renamed *Texas v. New York*)
- 513 U.S. 804 (1994) (Massachusetts's motion to dismiss its own complaint without prejudice denied; Massachusetts's amended complaint dismissed)

Oklahoma v. New Mexico, No. 109, Orig.

- 510 U.S. 930 (1993) (master's fee assessed)
- 510 U.S. 1106 (1994) (master's fee assessed; special master discharged)

Nebraska v. Wyoming, No. 108, Orig.²⁵⁴

- 513 U.S. 923 (1994) (master's report received)
- 513 U.S. 997 (1994) (master's fee assessed)
- 515 U.S. 1 (1995) (decision on merits authored by Souter, J.) (Thomas, J., concurring in part and dissenting in part)
- 518 U.S. 1002 (1996) (master's fee assessed)
- 519 U.S. 1038 (1996) (master's fee assessed)
- 521 U.S. 1116 (1997) (master's fee assessed)
- 522 U.S. 1026 (1997) (master's fee assessed)
- 525 U.S. 927 (1998) (master's fee assessed)
- 527 U.S. 1033 (1999) (master's fee assessed)
- 528 U.S. 1059 (1999) (master's fee assessed)
- 530 U.S. 1259 (2000) (master's fee assessed)
- 534 U.S. 40 (2001) (master's report received; final settlement stipulation approved; decree further modified)
- 122 S. Ct. 585 (2001) (modified decree entered)
- 534 U.S. 1076 (2002) (master's fee assessed)
- 535 U.S. 984 (2002) (special master discharged)

²⁵³. Descriptions of these cases, and a catalog of previous case activities, can be found in McKusick, *supra* note 3.

²⁵⁴. This case was formerly captioned as No. 4, Orig. and subsequently as No. 6, Orig.

- 132 S. Ct. 1072 (2012) (decree modified in part on joint motion)

Kansas v. Colorado, No. 105, Orig.

- 513 U.S. 803 (1994) (master's report received; master's fee assessed)
- 514 U.S. 673 (1995) (decision on merits authored by Rehnquist, C.J.)
- 519 U.S. 1005 (1996) (master's fee assessed)
- 522 U.S. 803 (1997) (master's report received)
- 522 U.S. 1028 (1997) (master's fee assessed)
- 522 U.S. 1073 (1998) (exceptions overruled without prejudice to renew)
- 526 U.S. 1048 (1999) (master's fee assessed)
- 529 U.S. 1015 (2000) (master's fee assessed)
- 531 U.S. 1008 (2000) (master's fee assessed)
- 531 U.S. 1122 (2001) (motion for leave to file reply to brief of United States granted; exceptions to master's report set for oral argument)
- 532 U.S. 902 (2001) (motion of Acting Solicitor General for divided argument granted)
- 533 U.S. 1 (2001) (decision on merits authored by Stevens, J.) (O'Connor, J., concurring in part and dissenting in part)
- 537 U.S. 1230 (2003) (master's fee assessed)
- 540 U.S. 1072 (2003) (master's report received)
- 540 U.S. 1101 (2004) (master's fee assessed)
- 541 U.S. 1071 (2004) (motion for leave to file sur-reply granted; exceptions to master's report set for oral argument)
- 542 U.S. 934 (2004) (Solicitor General's motion for divided argument granted)
- 543 U.S. 86 (2004) (decision on merits authored by Breyer, J.) (Thomas, J., concurring in part and concurring in judgment) (Stevens, J., concurring in part and dissenting in part)
- 543 U.S. 1046 (2005) (master's fee assessed)
- 546 U.S. 1166 (2006) (master's fee assessed)
- 552 U.S. 1129 (2008) (final master's report received; master's fee assessed)
- 553 U.S. 1092 (2008) (exception to master's report set for oral argument)
- 129 S. Ct. 617 (2008) (motion for leave to file sur-reply denied)
- 129 S. Ct. 970 (2009) (master's fee assessed)
- 556 U.S. 98 (2009) (decision on merits authored by Alito, J.) (Roberts, C.J., concurring)
- 556 U.S. 1233 (2009) (special master discharged)

United States v. Alaska, No. 84, Orig.

- 517 U.S. 1207 (1996) (master's report received)
- 519 U.S. 1038 (1996) (motion for additional time for oral argument granted; California's motion to participate as amicus curiae and for divided argument denied)
- 521 U.S. 1 (1997) (decision on merits authored by O'Connor, J.) (Thomas, J., concurring in part and dissenting in part)
- 521 U.S. 1144 (1997) (petition for rehearing denied)
- 530 U.S. 1021 (2000) (final decree entered; motion for leave to file counterclaim granted; jurisdiction retained)

Texas v. New Mexico, No. 65, Orig.

- 510 U.S. 1106 (1994) (river master's fee assessed)
- 512 U.S. 1202 (1994) (river master's fee assessed)
- 513 U.S. 803 (1994) (river master's fee assessed)
- 513 U.S. 997 (1994) (river master's fee assessed)
- 514 U.S. 1095 (1995) (river master's fee assessed)
- 516 U.S. 803 (1995) (river master's fee assessed)
- 517 U.S. 1232 (1996) (river master's fee assessed)
- 519 U.S. 803 (1996) (river master's fee assessed)
- 519 U.S. 979 (1996) (river master's fee assessed)
- 520 U.S. 1227 (1997) (river master's fee assessed)
- 524 U.S. 925 (1998) (river master's fee assessed)
- 525 U.S. 805 (1998) (river master's fee assessed)
- 526 U.S. 1085 (1999) (river master's fee assessed)
- 528 U.S. 925 (1999) (river master's fee assessed)
- 530 U.S. 1212 (2000) (river master's fee assessed)
- 531 U.S. 921 (2000) (river master's fee assessed)
- 533 U.S. 946 (2001) (river master's fee assessed)
- 534 U.S. 971 (2001) (river master's fee assessed)
- 537 U.S. 806 (2002) (river master's fee assessed)
- 539 U.S. 924 (2003) (river master's fee assessed)
- 540 U.S. 964 (2003) (river master's fee assessed)
- 544 U.S. 1059 (2005) (river master's fee assessed)
- 546 U.S. 806 (2005) (river master's fee assessed) (Roberts, C.J., not participating)
- 549 U.S. 806 (2006) (river master's fee assessed)
- 552 U.S. 804 (2007) (river master's fee assessed)
- 555 U.S. 806 (2008) (river master's fee assessed)

- 558 U.S. 809 (2009) (river master's fee assessed)
- 562 U.S. 820 (2010) (river master's fee assessed)
- 132 S. Ct. 81 (2011) (river master's fee assessed)
- 133 S. Ct. 398 (2012) (river master's fee assessed)
- 134 S. Ct. 372 (2013) (river master's fee assessed)
- 135 S. Ct. 322 (2014) (river master's fee assessed)
- 136 S. Ct. 289 (2015) (river master's fee assessed)

New Jersey v. Delaware, No. 11, Orig.

- 546 U.S. 1028 (2005) (motion to reopen and for supplemental decree denied; alternative motion for leave to file bill of complaint granted; docketed as No. 134, Orig.)

United States v. Louisiana, No. 9, Orig. (Texas Boundary Case)

- 525 U.S. 1 (1998) (supplemental decree entered on joint motion)

Arizona v. California, No. 8, Orig.

- 510 U.S. 930 (1993) (master's report received)
- 513 U.S. 803 (1994) (motion for leave to intervene referred to master)
- 514 U.S. 1081 (1995) (motion for leave to intervene denied)
- 528 U.S. 803 (1999) (master's report received)
- 528 U.S. 1147 (2000) (motion to file brief amicus curiae granted; exceptions to master's report set for oral argument)
- 529 U.S. 1015 (2000) (Solicitor General's motion for divided argument granted)
- 530 U.S. 392 (2000) (opinion on merits authored by Ginsburg, J.) (Rehnquist, C.J., concurring in part and dissenting in part)
- 531 U.S. 1 (2000) (supplemental decree entered; jurisdiction retained)
- 540 U.S. 1216 (2004) (memorandum opinion and order on motions for summary judgment and motion in limine received and filed)
- 541 U.S. 901 (2004) (motion for leave to intervene denied)
- 547 U.S. 150 (2006) (final settlement agreements approved; consolidated decree entered; jurisdiction retained;²⁵⁵ special master discharged)

²⁵⁵. Article IX remains in this decree. See *supra* note 133 and accompanying text.

United States v. California, No. 5, Orig.

- 135 S. Ct. 563 (2014) (fifth supplemental decree entered on joint motion; jurisdiction retained)

New York v. Illinois, No. 3, Orig.

- 558 U.S. 1145 (2010) (motion for preliminary injunction denied)
- 559 U.S. 1003 (2010) (renewed motion for preliminary injunction denied)
- 130 S. Ct. 2397 (2010) (motion to reopen and for supplemental decree denied; alternative motion for leave to file bill of complaint denied)

Michigan v. Illinois, No. 2, Orig.

- 558 U.S. 1145 (2010) (motion for preliminary injunction denied)
- 559 U.S. 1003 (2010) (renewed motion for preliminary injunction denied)
- 130 S. Ct. 2397 (2010) (motion to reopen and for supplemental decree denied; alternative motion for leave to file bill of complaint denied)

Wisconsin v. Illinois, No. 1, Orig.

- 558 U.S. 1145 (2010) (motion for preliminary injunction denied)
- 559 U.S. 1003 (2010) (renewed motion for preliminary injunction denied)
- 130 S. Ct. 2397 (2010) (motion to reopen and for supplemental decree denied; alternative motion for leave to file bill of complaint denied)

